

**A QUANTIFIED DECISION-MAKING APPROACH TO
PROBATION IN SOUTH AFRICA**

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submitted in accordance with the requirements for the degree of

DOCTOR OF LITERATURE AND PHILOSOPHY

in the subject

PENOLOGY

at the

UNIVERSITY OF SOUTH AFRICA

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JUNE 2002

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Degree: D.Litt et Phil.

Summary

Quantified decision-making refers to the scaling of factors such as crime seriousness, risk assessment, violation severity, and punitive responses or intensity of surveillance. As such, it is largely based on the justice principle, according to which the punitive response should be commensurate with the crime committed. This study consequently looks at the applicability of a retributive stance towards probation, and suggests a quantified, or structured, approach to decision-making in probation with special reference to the South African situation.

Referring to historical and ideological precedents, it is maintained that the current crisis in corrections - referring to the congestion of prison facilities and the negative spin-offs related to it - can, to a large extent, be ascribed to an over reliance on imprisonment as a sentencing option. It is argued that imprisonment can be seen as a failure in terms of both its basic motives, and more importantly, with regard to its unintended consequences, necessitating a search for viable sentencing alternatives.

With regard to probation, and Intensive Supervision Probation (ISP) in particular, this study recognizes its limitations, but maintains that probation still holds the greatest potential as a workable alternative to incarceration. In view of South African corrections, that is plagued by prison overcrowding, on the one hand, and certain structural shortcomings, on the other, a structured probation system is proposed that will evade the weaknesses of subjective decision-making, which often act to intensify the crisis. It is proposed that quantified decision-making tools be developed that will replace both sentencing and revocation decisions. It is further suggested that an effective risk prediction instrument be developed to guide the probation process.

TABLE OF CONTENTS

CHAPTER 1: BACKGROUND

1.1 INTRODUCTION	1
1.2 PROBLEM FORMULATION	4
1.2.1 Choice of the research topic.....	4
1.2.2 Metatheoretical assumptions.....	5
1.2.3 Research goal	5
1.2.4 Restrictions on the field of study.....	6
1.2.5 Presuppositions.....	7
1.3 TERMINOLOGY.....	9
1.4 RESEARCH STRATEGY.....	10
1.5 DIVISION OF CHAPTERS.....	11

CHAPTER 2: AN IDEOLOGICAL CRISIS

2.1 THE DEVELOPMENT OF PENOLOGICAL IDEAS	13
2.1.1 Theoretical underpinnings: two schools of thought.....	13
2.1.1.1 The classical school.....	13
2.1.1.2 The positivistic school	15
2.1.2 The development of the prison.....	17

2.1.2.1 The first prisons: the Penitentiary.....	17
2.1.2.2 The origin of parole: Maconochie's reforms and the Irish Marks System.....	20
2.1.2.3 The Reformatory	21
2.1.2.4 The Medical Model.....	23
2.1.3 Recent trends in penological thought	24
2.1.3.1 The decline of institutional rehabilitation	24
2.1.3.2 The resurgence of classicism: The justice model and the neo- utilitarian punishment model	29
2.1.3.2.1 <i>The justice model</i>	29
2.1.3.2.2 <i>The neo-utilitarian punishment model</i>	32
2.1.3.2.3 <i>The effects of the neo-classical school</i>	24
2.1.3.3 Re-affirmation of the rehabilitation ideal.....	38
2.1.3.4 Restorative justice.....	39
2.2 JUSTICE AND RETRIBUTION	48
2.2.1 What is retribution?.....	41
2.2.2 Necessity for the central role of retribution in justice	44
2.2.3 Translating just deserts into just sentences.....	45
2.3 SUMMARY AND EVALUATION	49
2.3.1 The classical and positivistic schools	49
2.3.2 The development of the prison	51
2.3.3 Recent developments on the terrain of corrections	54
2.4 CONCLUSIONS	58

CHAPTER 3: THE CURRENT CRISIS IN CORRECTIONS: THE FAILURE OF IMPRISONMENT

3.1 THE CURRENT CRISIS IN CORRECTIONS	63
3.2 EXTERNAL FACTORS CONTRIBUTING TOWARDS THE CRISIS IN CORRECTIONS	67
3.2.1 General sentencing trends	70
3.2.2 Public opinions	71
3.2.3 Political factors	73
3.3 THE FAILURE OF IMPRISONMENT AS A SENTENCING OPTION	74
3.3.1 The failure of imprisonment in terms of its intended consequences	75
3.3.1.1 Failure to rehabilitate	75
3.3.1.2 Failure to curb recidivism	76
3.3.1.3 Failure to deter would-be offenders from committing crime	78
3.3.1.4 Failure to protect the community	78
3.3.2 Failure of imprisonment in terms of its unintended consequences	80
3.3.2.1 The impact of incarceration on the families and children of prisoners..	80
3.3.2.2 The destructive and brutalizing effects of imprisonment	81
3.3.2.3 Destruction of future prospects	81
3.3.2.4 Inmate sexual assault and the dangers of HIV infection	82
3.3.2.5 The uneven application of imprisonment on the poor and disadvantaged	83
3.4 CONCLUSIONS	84

CHAPTER 4: PROBATION

4.1 DESCRIPTION	89
4.1.1 What is probation?.....	89
4.1.2 Origin.....	90
4.2 THEORETICAL UNDERPINNINGS: THE REINTEGRATION MODEL	91
4.2.1 Rationale	93
4.2.1.1 The community	93
4.2.1.2 The offender.....	94
4.3 PROBATION AS A SENTENCING OPTION.....	94
4.3.1 The court use of probation.....	94
4.3.2 The sentencing decision.....	95
4.3.2.1 The type of crime	96
4.3.2.2 The suitability of probation as a sentence	96
4.3.2.3 The type of offender.....	96
4.3.2.4 The safety of the community	96
4.3.2.5 Employment and a fixed address.....	97
4.3.2.6 The availability of community resources	97
4.3.2.7 The willingness of the offender	97
4.3.3 Intensity of application.....	97
4.3.3.1 The routine application of probation.....	97
4.3.3.2 Intensive Supervision Probation (ISP)	99
4.4 INTENSIVE SUPERVISION PROBATION	102
4.4.1 The need for ISP	102
4.4.2 Description of ISP systems.....	103

4.4.2.1 Target populations for ISP	105
4.4.2.2 The intensity of supervision.....	105
4.4.2.3 Conditions	107
4.4.2.3.1 House arrest and electronic monitoring.....	108
4.4.2.3.2 Drug and alcohol monitoring.....	109
4.4.2.3.3 Community service.....	109
4.4.2.3.4 Attendance of treatment programs.....	109
4.4.2.3.5 Probation fees.....	110
4.4.2.3.6 Restitution.....	110
4.4.3 The effectiveness of ISP.....	111
4.4.3.1 Cost-effectiveness	112
4.4.3.2 Its effect on keeping offenders out of prison	113
4.4.3.3 Curbing recidivism	114
4.5 EVALUATION OF ISP.....	115
4.5.1 What does these figures mean in terms of effectiveness?	115
4.5.1.1 In terms of the real meaning of these failures	115
4.5.1.2 In terms of the ways in which it can be seen as effective.....	116
4.5.1.3 In terms of the failure of imprisonment.....	117
4.5.1.4 In terms of its application	117
4.5.1.5 In terms of its limitations.....	118
4.6 CONCLUSIONS	118

**CHAPTER 5: MERGING THEORY AND PRACTICE: FOUR
MODELS OF PROBATION**

5.1 REHABILITATION MODEL 121

5.1.1 Description 121

5.1.2 Sketch 122

5.1.3 Explanation..... 124

5.1.4 Evaluation..... 126

5.2 RESTORATIVE JUSTICE MODEL..... 126

5.2.1 Description 127

5.2.2 Sketch 129

5.2.3 Explanation..... 131

5.2.4 Evaluation..... 132

5.3 RISK-CONTROL MODEL 134

5.3.1 Description 134

5.3.2 Sketch 136

5.3.3 Explanation..... 138

5.3.4 Evaluation..... 140

5.4 STRUCTURED MODEL..... 141

5.4.1 Description 141

5.4.2 Sketch 142

5.4.3 Explanation..... 144

5.4.4 Evaluation..... 145

5.5 SUMMARY AND CONCLUSIONS 145

5.5.1 Evaluation of different models 147

5.5.1.1 The rehabilitation model.....	147
5.5.1.2 The restorative justice model	148
5.5.1.3 The risk-control model.....	149
5.5.1.4 The structured model	150
5.5.2 Conclusions	150

CHAPTER 6: THE SOUTH AFRICAN SITUATION

6.1 THE CORRECTIONAL SCENE IN SOUTH AFRICA.....	153
6.1.1 Description	154
6.1.2 The crisis in South African corrections	155
6.1.3 External factors shaping South African corrections	157
6.1.3.1 Political factors.....	157
6.1.3.2 Economic factors	158
6.1.3.3 Public opinions.....	158
6.1.3.4 Sentencing trends.....	160
6.2 THE SITUATION REGARDING PROBATION	163
6.2.1 The introduction of probation.....	163
6.2.2 A description of probation in South Africa.....	164
6.2.3 The underutilization of probation	165
6.2.3.1 What is meant by the underutilization of probation in South Africa? ..	165
6.2.3.2 A problem of perceptions	168
6.2.3.3 A problem of application.....	169
6.3 CONCLUSIONS	170

CHAPTER 7: DRAWING THE STRANDS TOGETHER

7.1 THE CRISIS IN CORRECTIONS 174

7.2 WHAT IS REQUIRED OF A VIABLE ALTERNATIVE TO IMPRISONMENT?..... 175

7.2.1 Structural requirements of alternatives to imprisonment..... 176

7.2.2 Utilitarian requirements of alternatives to imprisonment..... 176

7.2.2.1 Specific deterrence 177

7.2.2.2 General deterrence 177

7.2.2.3 Rehabilitation 177

7.2.2.4 Incapacitation..... 178

7.2.3 Justice 178

7.3 PROBATION AS AN ALTERNATIVE TO IMPRISONMENT 179

7.4 THE LIMITATIONS OF PROBATION..... 187

7.4.1 The kind of offender who can be placed on probation..... 187

7.4.2 Public opinions 187

7.5 PUTTING WHAT HAS BEEN LEARNT INTO PRACTICE - ELEMENTS OF A MORE JUST PROBATION SYSTEM 189

7.5.1 Probation in terms of a justice stance..... 189

7.5.2 Community safety..... 190

7.5.3 Rehabilitation..... 192

7.5.4 Cost-effectiveness 192

7.5.5 In terms of public opinions..... 192

**CHAPTER 8: SUGGESTIONS IN TERMS OF A
QUANTITATIVE DECISION-MAKING MODEL FOR
PROBATION IN SOUTH AFRICA**

8.1 BASIC PRINCIPLES 194

8.2 DESCRIPTION OF STRUCTURE 195

8.3 SOME IMPLICATIONS OF THIS MODEL 202

8.4 END NOTE 204

BIBLIOGRAPHY 205

LIST OF TABLES

TABLE 4-1 Probationers with special conditions in the United States, 1995 101

TABLE 4-2 Conditions of ISP programs in 31 states (1986) 110

TABLE 5-1 Comparisons between four models of probation 146

TABLE 8-1 A proposed violation severity scale 201

LIST OF CHARTS

CHART 4-1 Supervision contacts in 31 states 107

CHART 6-1 Comparison of main sentencing options in different continents 166

LIST OF DIAGRAMS

DIAGRAM 2-1 Structure of just deserts decisions 46

DIAGRAM 3-1 Causes of the crisis in corrections 68

DIAGRAM 3-2 Consequences of the failure of imprisonment 85

DIAGRAM 5-1 Rehabilitation model	123
DIAGRAM 5-2 Restorative Justice model	130
DIAGRAM 5-3 Risk-control model	137
DIAGRAM 5-4 Structured model	143
DIAGRAM 7-1 Assessment of strong and weak points of probation in relation to imprisonment	183
DIAGRAM 8-1 Proposed probation model for South Africa	196

CHAPTER 1: BACKGROUND

1.1 INTRODUCTION

This study takes a comprehensive look at probation, analysing it in terms of its effectiveness as a sentencing option and proposing - with reference to the correctional scene at the moment - a revised model of probation. The caption used here, namely to propose a quantitative decision-making approach of probation in South Africa, actually predicts one of the conclusions reached in this study.

The rationale behind this proposal is as follows:

1. That corrections in our country (just as in many others) experiences a crisis in terms of the overcrowding of our prisons and the effects thereof.
2. That imprisonment as a sentencing option has been a failure in relation to both its intended and unintended consequences and that it should be reserved only for the most dangerous offenders.
3. That, with regard to the available sentencing options, probation presents the best potential for a long-term solution to the problems currently faced.
4. That probation, in the South African context, is largely underutilised by the courts, partly as a result of judicial officers having lost confidence in the system.
5. That it is therefore necessary to re-evaluate the probation system in South Africa and to redesign the system.
6. That a quantitative approach to decision-making in probation shows the most promise in ensuring fairness and effectiveness.

The present situation can, to a large extent, be ascribed to a crisis situation - not only in connection with the overpopulation of prisons and its consequences, but also with regard to the motives underlying punishment (as described in chapter 2), and the inability of current sentencing options to limit recidivism (chapters 3 and 5).

In South Africa, as in many other countries, prison congestion is probably the most pressing problem facing corrections today. The situation here is even more serious than in most other countries as South Africa has the fourth highest prison-figure in the world (with 368 people per 100 000 of the population incarcerated at any one time), which lies only behind China (with about 1 600 prisoners per 100 000¹), Russia with 685, and the United States with 645 (Murphy 2001:127). Overcrowding does not only present problems related to management and finances but also gives rise to various other negative spin-offs. In a briefing by the South African Ministry of Correctional Services on 26 July 1999 (South Africa. Department of Correctional Services 1999:2) it was stated that: "The high density of prisoners in most of our institutions inevitably impacts on the behaviour of inmates, it promotes corruption, it has a negative effect on our staff, it hampers the application of rehabilitation and treatment programs, it encourages gangsterism, homosexuality and many other social ills."

The overcrowding issue can, to a large extent, be seen as the result of some deeper-lying deficiencies in our correctional and criminal justice systems. Although emergency reactions such as amnesty and prison bursting may provide short-term answers to the congestion of prisons, it is the contention of the writer that practicable, long-term solutions to the problem should rather be sought after. It will be argued in this study that imprisonment, both in an

¹ Although there are no official figures available, estimates by some human rights organisations estimate that there are approximately 20 million people in Chinese prisons, which would translate to a prison figure of 1 677 per 100 000 of the population. This would make it the country with the highest prison population figure by far. (Source: The Guinness Book of Records 1996:192).

ideological and practical sense, has been a failure, and that workable alternatives to incarceration are urgently needed. This does not mean that imprisonment can be made obsolete within the context of the modern range of sentencing options, but rather that it should be used more sparingly, and reserved for those offenders who pose a real threat to society.

When the South African Department of Correctional Services introduced probation in 1991, it was welcomed - both by scholars and correctional practitioners - as the sentencing option of the future; which would not only alleviate the pressure on prisons, but would also be a vehicle for the more effective treatment of offenders. Today, probation in this country has largely been a disappointment in terms of providing a convincing substitute to imprisonment, since only about 11 per cent of all cases handled by the Department of Correctional Services are placed on probation. This is in sharp contrast to the United States, where almost twice as many people are put on probation than are sent to prison (Loven 2001). It is even debatable whether probation in South Africa actually reduces prison figures by this percentage because of net-widening, where sentencing officials place people on probation who would formerly have been released unconditionally or with a suspended sentence, or who would have received fines.

The purpose of this study is to "re-introduce" probation as a realistic alternative to imprisonment. It will be argued that, in terms of the philosophical and historical precedents created within the field of corrections in general, and with regard to the corrections situation in South Africa in particular, there is an urgent need to re-evaluate probation as a sentencing sanction. It is the opinion of the researcher that a revised system of probation should include the principles of fairness, effective risk control, and should also - within the limitations of the system - present offenders with the best opportunities to reform themselves.

1.2 PROBLEM FORMULATION

1.2.1 Choice of the research topic

1. The reason for choosing this topic is firstly the result of the researcher developing a keen interest in probation after working in both prisons (from 1984 to 1992) and as a probation officer (1992-1994). The perception that the author formed about probation was that it had much more potential to reform offenders than incarceration, but that its effectiveness depends to a large extent on the way in which it is applied. This study can thus be seen as the result of a number of years' thoughts on how the system of probation can be transformed into a workable alternative for imprisonment.
2. A second reason for deciding on this topic has to do with the practical implications of the issue. Imprisonment often damages not only the future prospects of prisoners to return to a meaningful life after release¹, but also destroys families and discriminate against certain segments of the population. The interests of the community are also at stake, due to the inability of imprisonment to prevent recidivism. Although it can be argued that offenders bring this situation (of being imprisoned) on themselves and deserve to be punished, this study will contend that, because of its unintended consequences, punishment conveyed by imprisonment is often totally disproportionate to the crime committed. These injustices cast a shadow over the morality of the sentence and also over the moral standards of the society that applies it.
3. In an academic sense, penology (or corrections) is an exceptionally interesting field of study where theory and practice are closely related, and where abstract principles often have far-reaching consequences in practice. As for the field covered in this

¹ As reflected in the words of United States judge J.T. Curtin (2001:871): "At present, the warehousing of prisoners is not just a punishment, but for many it cuts off all hope for a fruitful life after release."

study, an investigation into the failure of imprisonment, on the one hand, and developing an alternative model that strives towards justness, on the other, involves the unravelling of various concepts with regard to their real meaning and significance, and drawing together a variety of strands - philosophical, theoretical and practical - to reach meaningful conclusions. Penological history also offers an interesting reflection of practical value in terms of the practicality of different domain assumptions; in particular the debate between the classical and positivistic schools and its relevance for today.

1.2.2 Metatheoretical assumptions

The differences in domain assumptions between different schools of thought obliges the researcher to specify his perspective that is determined to a large extent by the “justice” model of corrections (see chapter 2). As such, the writer espouses the notion suggested by David Fogel (1975) that the main purpose of corrections should be to apply “justice as fairness,” and that justice should be the key phrase in dealing with all parties concerned - the offender, the victim, society, and even the various officials involved in the justice system (see point 2.1.3.2.1). The philosopher John Rawls (1972:3) defines justice as: “...the first virtue of social institutions, as truth is of systems of thought,...a theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.” In this sense it will be argued that even utilitarian objectives (although they may be promising) should sometimes be rejected if they are in conflict with basic notions of right and wrong.

1.2.3 Research goal

The research goal is to revise the probation system in the South African context by:

- Analysing the present situation in corrections with regard to its historical development, its objectives, external factors that contribute in shaping it, and practical lessons learnt from its application,
- evaluating imprisonment as a sentence,
- examining probation in terms of its application, purposes, potential and application,
- investigating South African corrections with regard to its particular characteristics and needs, and
- devising a probation system that is based on the lessons learnt from history, a rational application of punishment motives, and “best practices” from the successful application of probation in other countries.

Taking into account the classification of research goals by Mouton & Marais (1990:14), this study can be described as:

- Descriptive (describing various concepts and practices within the field of corrections),
- explanatory (explaining the functions of various practices within particular intellectual frameworks), and
- exploratory (exploring the interrelationships between various factors, and searching for ways to improve the system of probation in South Africa with regard to specific conditions that characterise local needs and circumstances).

1.2.4 Restrictions of the field of study

Because of its wide compass, this study purposely omits the following related issues:

- The field of juvenile corrections.
- Remand sentencing.

- The use of probation as a backdoor (or release) mechanism.

Although each of these fields is important in providing a full picture of the corrections issue, their respective implications are just too wide to be covered in this work.

1.2.5 Presuppositions

The following presuppositions regarding this study should be noted:

1. An important supposition is the assumption that findings in international literature, specifically pertaining to criminal justice and corrections, can be generalised to such an extent that they are applicable to the situation in this country.

Although the issue of generalisation is seldom referred to in correctional literature, Newman, Bouloukos and Cohen [2002] explain the similarities of criminal justice systems in terms of the concept of the modern nation-state. According to these writers, the reason for the similarities of criminal justice systems – the police, courts, prisons - all over the world lies in the emergence of the nation-state in Europe in the 16th century that drove countries such as England, Spain, France, Portugal and Holland to expand and impose their national identities on other countries by means of colonisation. Many countries are former colonies of Western powers, but even countries that have not been colonised are strongly influenced by the concept of the nation-state, and by the concept of the basic criminal justice system, as it is known today. Albrecht (1998:68) also refers to pressure being exerted by western industrialized countries on so-called transitional countries – partly by means of economic incentives - to bring their criminal justice systems into line with international legal and control systems. These factors have led to remarkable similarities between correctional systems, especially with regard to

imprisonment, that enables the researcher to make use of research findings in other countries.

2. Another presupposition closely related to the previous point has to do with the dominance of the United States of America on the field of corrections. Programs developed and applied in the United States and philosophies endorsed in America dictate international corrections to such an extent that a study of developments in the United States can, for all practical purposes, be described as the history of corrections. Even European countries inherit most of their ideas about corrections from the United States – a trend that is also evident in our country, where most of the latest correctional practices are directly traceable to developments in the United States. Although various factors are undoubtedly at work in causing this state of affairs, the main reasons are as follows:

- i. Because of its size and its ethical and cultural diversity, the USA can to a large extent be seen as a microcosm of the world that enables the testing of practices under diverse conditions;
- ii. In contrast to most other developed countries, the United States has a serious crime problem that necessitates careful consideration of the effectiveness of correctional measures;
- iii. The USA has the resources (both financially and intellectually) to search for imaginative new correctional tools and to analyse the effectiveness thereof.

In addition, findings obtained from American studies are usually well researched and documented and can mostly be trusted insofar as their potential outcomes in other countries would be.

3. A third presupposition is that a search for justice should underlie all attempts at improving the system of corrections.
4. This study does not attempt to fit into the current justice system in South Africa because of its specific assumptions. It consequently does not examine present legislation and court decisions in an effort to fit probation into the *status quo*, but deliberately stands back from present legal practices and reflects on improving the system as such.

1.3 TERMINOLOGY

Although the meanings of various concepts are explained as they appear in this study, some generally used terms should be clarified because of their prominence and because it is necessary to draw a clear distinction between their different uses.

The most important terms to define concern the different uses of the term “probation.”

Probation refers to a sanction where an offender is permitted to stay in the community under supervision subject to certain conditions set by the court (Welch 1996:389). With routine probation, only minimum supervision is usually applied and conditions normally entail little more than that the probationer should refrain from committing further crimes and should not leave the jurisdiction without permission (see point 4.3.3.1). Probation, as applied in South Africa, however, is an Intensive Supervision Probation (ISP) program¹, and is based on the Georgia IPS-system. IPS programs, or intermediate sentences, as they are often referred to, entails a totally different approach, where stringent supervision is applied, and stricter conditions are adhered to the sentence (see point 4.3.3.2).

¹ Also referred to by some writers as Intensive Probation Supervision (IPS).

Referring specifically to American and South African uses of the term “prison,” it is important to notice the differences between a prison and a jail in the United States. Funk & Wagnalls (1970 S.v. “prison”) describes a prison as: “A place of confinement; specifically, a public building for the safekeeping of persons in legal custody; a penitentiary.” In the United States, the most important characteristic of a prison is that it detains convicted felons that are sentenced to imprisonment of one year and longer. Jails are used to hold pre-trial detainees, convicted offenders doing less than one year, and convicted felons who await transfer to their assigned prisons (Welch 1996:167). In South Africa, on the other hand, prisons are used to detain all convicted prisoners as well as pre-trial detainees, although they are kept in different sections of the prison.

1.4 RESEARCH STRATEGY

The approach followed in this study is determined to a large extent by the nature of the investigation. To devise a functional and effective system of probation, it is necessary to look a wider look at aspects such as the philosophies that underlies corrections, at the historical development of correctional ideas, and at current ideologies.

The research strategy involves:

- i. A literature study of the study terrain.
- ii. Ideas forwarded by the researcher that emanate from practical experience whilst working in both the prison and probation. This can, to a certain extent, be described as “participant observation.”
- iii. Talks on an unstructured basis with various functionaries from the departments of corrections and justice, and with experts on the field of penology.

- iv. Theoretical exploration of the field of study to revise the probation system in South Africa.

1.5 DIVISION OF CHAPTERS

Chapters are divided according to a logical succession of ideas. It is set out as follows:

- Chapter 1 provides with an orientation to the study.
- Chapter 2 deals presents the background to the present crisis in corrections, and discusses the development of penological ideas leading up to the current situation.
- In chapter 3 the crisis in corrections, specifically pertaining to imprisonment, is analysed.
- Chapter 4 focuses on probation as a feasible alternative to incarceration, describing probation as sentencing option, its potential, and the underutilisation of probation as a penal option.
- To demonstrate the relationship between theory and practice, chapter 5 compares four correctional philosophies of probation. The models discussed are: i) A rehabilitation model, ii) a control/community safety model, iii) a restorative justice model, and iv) a structured model.
- Chapter 6 deals exclusively with the South African situation, describing its characteristics, the circumstances surrounding imprisonment, and the situation regarding probation.
- Chapter 7 draws the strands together in terms of the significance of the previous chapters for the revisement of probation.
- Chapter 8 suggests a quantified model, based on the findings made in this study.

CHAPTER 2: AN IDEOLOGICAL CRISIS

Chapter 2 will look at the development of penological ideas leading up to the present situation, concentrating in particular on reasons why the current crisis in corrections should not only be seen in terms of high crime rates and overcrowded prisons, but lies much deeper in what can be described as a bankruptcy of ideas and options. As will be shown throughout this study, the interplay between the ideologies of the classical and positivistic schools largely lies at the heart of the matter, since it is evident that people entertain different, almost "polar," opinions about the concept of justice.

Justice in a retributive sense is an important aspect of penology, and perhaps the greatest lesson to be learnt from this history of punishment is that justice without equal adjudication amounts to injustice. It is therefore advisable that the author adds to this discussion of the development of punishment a brief account of what he understands under the concepts "retribution" and "justice."

Three topics are dealt with in this chapter:

1. A summary of the most important historical facts, and how the current situation originated.
2. A brief discussion of retribution and justice.
3. An interpretation of the history of punishment from a retributive viewpoint.

The history of punishment, as such, is treated under the following three captions:

1. Theoretical underpinnings: the classical and positivistic schools;
2. the development of the prison (the penitentiary, the origin of parole, the reformatory, and the medical model; and

3. the situation today.

It should be noticed that the stages discussed here do not attempt to provide an account of the whole correctional picture, but portray only some of the most significant moments in the history of penal thought that have a direct bearing on the present situation.

2.1 THE DEVELOPMENT OF PENOLOGICAL IDEAS

2.1.1 Theoretical underpinnings: two schools of thought

2.1.1.1 The classical school

The modern era in penology began with the classical school in the eighteenth century. According to Welch, the Era of Enlightenment (or of "reason") emerged during the mid-eighteenth century in Europe (1996:48). Under the influence of scientists such as Isaac Newton, who presented a systematic synopsis of the laws of physics, intellectuals started to investigate social and scientific phenomena in a methodological and objective way. Intellectuals such as Voltaire and Montesquieu also criticised the orthodox religious viewpoints of their day and focused instead on the power of reason, humanitarianism, utilitarianism and secularism in interpreting and analysing the world (*Ibid.*, p.49).

The Marquis de Beccaria (1738-1794), who can be seen as the central figure of the classical school of criminology, was strongly influenced by the writings of Montesquieu and Voltaire, especially with regard to their notions on utilitarianism and deterrence (Welch 1996:49). In his famous treatise "Essay on Crimes and Punishments," Beccaria condemned the penal practices of his day, including practices such as the unfettered exercise of discretion by judicial officers, capital punishment, the use of torture to obtain confessions, the debtor's

prison, reinterpretation of laws by judges, and the excessive punishment of minor offenders. Concerning judicial discretion, Beccaria's intentions are obvious in the following excerpt from his essay "On Crimes and Punishments" (Beccaria 1986:11 [1764]):

Nothing is more dangerous than the common axiom that one must consult the spirit of the law...Everybody has his own point of view, and everybody has a different one at different times. The spirit of the law, then, would be dependent on the good and bad logic of a judge, on a sound or unhealthy digestion, on the violence of his passions, on the infirmities he suffers, on his relation with the victim...Thus we see the fate of a citizen change several times in going from one court to another, and we see that the lives of poor wretches are at the mercy of false reasonings or the momentary churning of a judge's humors.

In this strong condemnation of judicial discretion, Beccaria does not call on judges to interpret laws. Their task is limited to determining guilt and to apply punishment as prescribed by the law. Following Voltaire's and Montesquieu's views on utilitarianism, Beccaria held that the only motives for punishing offenders should be to ensure the survival of society and deter people from committing crime. He was critical, however, of arbitrary and unnecessarily harsh punishment to attain the purpose of deterrence, and suggested instead that punishment should be quick, certain, and commensurate with the crime. Beccaria gave much prominence to the fact that punishments should be carefully graded to correspond with the gravity of offences, in other words, that the punishment should be proportionate to the crime.

Jeremy Bentham (1748-1832), the other main figure in this school, elaborated on the concept of free will and proposed the doctrine of "felicific calculus," by which he meant that people are normally rational beings, who would only engage in acts of crime after careful consideration of all the relevant pros (pleasures) and cons (pain) involved (Conklin 1992:433). These ideas are

based on an indeterministic view of responsibility¹, according to which man has a free will to choose between right and wrong and can therefore be held accountable for his actions.

2.1.1.2 The positivistic school

The late nineteenth century saw the development of a “scientific” viewpoint, which stressed that everything, including crime, had natural causes that can be understood and controlled. The positivistic school of criminology, which was also a result of the principles of the Enlightenment, held that crime, similar to other natural and social phenomena, is caused by factors and processes that can be discovered through scientific investigation.

The views of the positivistic school are based on a deterministic perspective, which sees responsibility in terms of man being an involuntary victim of his situation. Determinism stresses the importance of external factors (such as the individual’s genetic make-up, life history and the socio-economic milieu in which he or she finds themselves), as causal factors in explaining criminal behaviour. In this sense, man is the product of various and variable factors and can therefore not be held accountable for his or her actions. Because of this notion, punishment does not make sense and is about as futile as hitting someone over the head because he has toothache. Criminals are seen as mentally ill, and just as people who are sick receive medical treatment, people who suffer from the illness of criminality should undergo psychological treatment.

¹ The indeterministic view of responsibility centres around the rationalistic conception that man’s essence is in his intellect or reason, and that his intellect enables him to understand and control observed phenomena, including his actions. Because of this ability, he carries responsibility for his actions and can thus be held accountable. This is the opposite of the deterministic viewpoint. (Neser, Cilliers & Van den Heever 1989:109).

The positivists also argued that, if these external factors and processes were properly understood, it should be possible to devise real solutions to the crime problem by neutralising the causes of crime and by reforming offenders (diminish their criminal propensities).

The positivists were critical of the standpoints of the classical school, and viewed their own ideas on treating the causes of crime as superior. According to the positivists, the classical emphasis on punishment was short-sighted in that it failed to address the causes of crime. Enrico Ferri, one of the prominent positivistic criminologists, consequently pointed out that: "...the Classical school of criminology, being unable to locate in the course of its scientific and historical mission the natural causes of crimes...was not in a position to deal in a comprehensive and far-seeing manner with this problem of the remedy against criminality" (1910:229). According to Lombroso (*cited in* Toch 1986:154), the aim of rehabilitation is that: "...we make the punishment fit the criminal rather than the crime," which is directly opposite to the classical idea of proportionality of punishment to crime.

Significant with regard to the positivistic ideal are the following measures that were developed to sustain the idea of rehabilitation in practice:

- The use of imprisonment as the main form of punishment, because the prison is seen as an ideal venue for the application of treatment.
- The use of diagnostic centres, where offenders would undergo psychological testing, and where they would be classified according to the treatment regime needed to cure them.
- Compulsory treatment of inmates.
- The indeterminate sentence, which implies that terms of imprisonment should not be related to the seriousness of the crime, but to the individual's rate of reformation.

- The use of the parole board to decide on the release-date of offenders, with the underlying idea that this board could determine when someone is rehabilitated or not.
- The use of psychotherapy as the instrument through which the psychological problems of the offender can be cured.

2.1.2 The development of the prison

The development of the “modern” prison was the next significant moment in the development of penological philosophy. The use of the imprisonment as a correctional tool can probably be traced back to the writings of Jeremy Bentham, who advocated penalties that were only severe enough to offset the perceived pleasures of illicit gains and not any harsher. Because imprisonment provides an ideal way of fitting the punishment to the crime by varying the length of confinement, it became the standard form of judicial punishment that is used today. Before Bentham, prisons were not used to punish as such, but rather for detention purposes. The kinds of people who were kept there typically included those awaiting trial, insane people, vagabonds, debtors until they could pay their fines, political opponents, etc.

2.1.2.1 The first prisons: the Penitentiary

The first prisons that were based on the principles of utilitarianism and humanitarianism held the belief that prisoners should be isolated from each other to prevent criminal contamination. The word penitentiary is derived from the root for “repentance,” which is a religious term having to do with the absolution of guilt (Barnes & Teeters 1959:329). Although some of the practices used in these prisons can be seen as cruel today, this was not the intention of early penal reformers, who regarded these institutions as a humane alternative to some of the extreme corporal penalties used during the Middle Ages.

One of the first of these new institutions was the Walnut Street Jail in Philadelphia (1790) that was based on a “progressive” system for the treatment of offenders, which included classification, individualised treatment and prison labour. An important principle was the notion that serious offenders should be isolated in individual cells, because: “...the addition of unremitted solitude to laborious employment will contribute as much to reform as to deter” (Ives 1970:174). In practice, the remedial results of isolation did not materialise and by 1816, prison discipline had deteriorated completely, and violence and riots eventually led to the closure of the institution in 1835.

The failure of the Walnut Street Jail did not affect the belief in solitary confinement as a reformatory measure. Under the influence of the Quakers who were opposed to the harsh corporal punishments of the past, and more specifically as a result of intervention by the Philadelphia Society for Alleviating the Miseries of Public Prisons, the Eastern State Penitentiary was erected in 1829 to give support to the idea that a mixture of industry and religious instruction, administered to prisoners in solitary confinement, would transform offenders into solid citizens (Bartollas & Conrad 1992: 66). The Philadelphia society was convinced that prisoners would also be redeemed in the sight of God and their fellow man if they were kept in solitude. There they could pray, meditate upon their sins, and reconstruct their lives through patient religious guidance.

This prison comprised of seven wings, each containing 76 single cells, radiating from a central hub from where personnel could maintain close control. Inside their cells, prisoners were occupied with handcraft such as shoemaking, spinning, weaving and dying materials. The chief purpose of these measures was to obtain reformation by means of the complete isolation of the prisoner. Even when prisoners attended church services, they were kept in single cubicles that prevented them from seeing each other.

The system, in fact, did little to rehabilitate offenders. Furthermore, the system proved costly to run and was soon congested. When double celling had to be introduced because of overcrowding, it also meant that the principle of solitude came to an end (Bartollas & Conrad 1992:69).

A third example of a prison based on the principle of isolation is the Auburn prison in New York that was established in 1815. As experience taught prison administrators that single celling was too expensive, the problem was to devise a system of solitude where large numbers of prisoners were working together. The Auburn Silent System was the result of a proposal by the deputy warden, John Gray.

The system demanded that prisoners be silent at all times. They had to march in lockstep and warders watched prisoners closely for signs of communication. The warden of this prison was a notorious figure, Captain Elam Lynds (1784-1855). Lynds, who was formerly an officer during the American Civil War, thought little of treatment, and was of the opinion that all prisoners were cowards who needed their spirits broken before they could be reformed. Every effort was therefore made to deprive prisoners of their self-respect and personality. They were dressed in striped uniforms and were referred to by their prison numbers. Visitors were not allowed and prisoners were not permitted to send or receive any letters.

In spite of all these atrocities, the system proved to be quite popular in prison administration circles, mainly because it was relatively inexpensive to run and prisoner labour was beneficial for the state.

During the late 1800's a new wave of optimism led to the introduction of a progressive classification system that was derived mainly from the penal experiments conducted by Alexander Maconochie and Sir Walter Crofton. These two systems: the one developed by

Maconochie on Norfolk Island and the Irish Marks System by Crofton, are important in that they can be seen as predecessors of the parole system as it is currently employed.

2.1.2.2 The origin of parole: Maconochie's reforms and the Irish Marks System

In 1840 Alexander Maconochie, a retired naval captain, was placed in charge of one of the worst of the British penal colonies, Norfolk Island, situated approximately 1500 kilometres northeast of Sidney, Australia. About two thousand convicts were kept there, usually of the type that were "doubly convicted" - having first committed a serious crime in England and thereafter one in Australia as well. According to a Catholic priest (*quoted in Barry 1956:145*) who visited the island in 1834, the conditions and treatment at Norfolk were so bad that some men, upon hearing that the governor condemned them to death, went on their knees and thanked God.

When Maconochie observed the terrible conditions prevalent in this penal colony, he introduced a marks system whereby prisoners would receive a certain number of "marks of commendation" for completing of certain assigned tasks. Marks earned could then be used to purchase food and clothing, and could also accumulate to a total that would enable the prisoner to a ticket of leave from the island. Six thousand marks would discharge a seven-year sentence, and eight thousand marks would free a man from a life sentence (Bartollas & Conrad 1992:45). Instead of flogging, marks were subtracted for disciplinary violations.

Unfortunately, this plan brought him into conflict his superiors, and in 1844 Maconochie was summoned back to England. In England he spent the rest of his life engaged in a campaign to reform the British prison system. His most important follower was Sir Walter Crofton, the initiator of the marks system in Ireland.

When the transportation of convicts to Australia ended in 1868, English authorities started to concentrate on the development of penitentiaries, based largely on the Pennsylvania system (the isolation of convicts). In the 1850's the British Parliament passed a succession of Penal Servitude Acts that eventually led to a "Progressive Stage System" of convict management (Bartollas & Conrad 1992:83-84). In 1854, Sir Walter Crofton was sent to introduce this progressive stage system at a new prison at Mountjoy, near Dublin in Ireland. This system became known as the Irish Marks System.

The system applied to convicts serving prison terms of three years or longer, and consisted of three stages. Each subsequent stage led to increased privileges and a certain number of marks had to be earned to succeed to the next stage. Time served in the last class depended on the length of the sentence and on the number of marks earned, so that a sentence of 15 years could be completed in 10 years, if the maximum number of marks were earned.

The purpose of this system was for the offender to work towards his own rehabilitation. The gradual reduction of restrictions intended to change the attitudes and behaviour of prisoners to such an extent that, when finally released, they would be unlikely to return to a life of crime. Although much opposition was lodged against this system, it later became the standard in Britain and also in the United States through the National Reformatory Movement.

The importance of the two stages above lies mainly in their contribution towards shaping today's parole system. The basic premise is that it would be to the advantage of both the prisoner and the prison administration if the detainee's cooperation could be obtained.

2.1.2.3 The Reformatory

The transformation of American corrections began in 1870 with the assembly of the National Prison Congress. The systems developed by Maconochie and Crofton blew new life into

correctional idealism and provided the message that “hope is a more potent agent than fear” (Bartollas & Conrad 1992:6). By using the marks system, prison administrators believed that it would be possible to reform prisoners by making privileges and release dates dependent on good behaviour. Some of the key principles adopted at the National Prison Congress were that:

- Reformation, and not suffering, should be the purpose of penal treatment of offenders.
- Classification should be made on the basis of a marks system.
- Rewards should be provided for good conduct.
- Prisoners should be made to realise that their destiny is in their own hands.
- Fixed sentences should be replaced by indeterminate sentences.
- Religion and education are the most important agencies of reformation.
- Prison discipline should be such as to gain the will of the prisoner and to conserve his self-respect.
- The aim of the prison should be to produce industrious free men rather than orderly and obedient prisoners (Barnes & Teeters 1959:71).

To replace the failing penitentiary a new correctional tool, the reformatory, was developed. The best-known example of a reformatory illustrating the ideals mentioned above is the Elmira Reformatory. Zebulon Brockway, warden of the Elmira Reformatory in New York from 1876 to 1900, attempted to move away from the indeterministic view of human behaviour and held the belief that offenders should be treated in such a way that the community is protected and the wrongdoer is rehabilitated simultaneously. The following measures were included in his program:

- A points system, whereby good behaviour earned points and uncooperative behaviour lost them;

- A system whereby prisoners with good grades would receive certain privileges, which included better living conditions.
- Compulsory schooling.
- Daily military drill.
- Real-life job training, which would ensure that every convict being released from Elmira would be able to find work.
- Physical training in gymnasiums.
- Good nutrition; and
- Exposure to religious and moral influences.

It is obvious that Brockway wanted to introduce prisoners to wholesome and constructive morals to assist in their reformation. Unfortunately, this program proved too difficult for many of the participants, and warders eventually resorted to corporal punishment and solitary confinement to maintain discipline. As this was contrary to the rudimentary principles of a reformatory system, the system was ultimately disbanded.

2.1.2.4 The Medical Model

In the early 1900's, another correctional philosophy came to the foreground. The accent in this approach was on the individualised treatment of offenders based on advances made in the medical sciences. One product of this philosophy was the medical model that became prominent in the 1920's. This model was based on the deterministic view of responsibility and assumed that crime should be seen as a psychological deviation. This implies that criminal offenders are mentally ill and can therefore not be held accountable for their behaviour. Everything a person does is seen to be the result of a series of previous events and other

causes over which the offender has little control, such as social, psychological and genetic factors (see point 2.1.1.2).

Benjamin Kaysman, (*cited in* Bartollas 1985:9-10) describes the assertions of this model as follows:

We have to treat them (inmates) as sick people, which in every respect they are... It is the hope of the more progressive elements in psychopathology and criminology that the guard and the jailer will be replaced by the nurse, and the judge by the psychiatrist, whose sole attempt will be to treat and cure the individual instead of merely to punish him. Then and only then can we hope to lessen, even if not entirely to abolish, crime, the most costly burden that society has today.

Although the purely positivistic approach that is under discussion here, was never fully applied in most judicial systems, the ideology of the medical model had an enormous impact on correctional thought in most countries of the world. Firstly, the treatment model was seen as an ideal type to be pursued and to which, scholars argued, prison reform should increasingly strive. The practical measures in which the positivistic ideal was to be realised (especially judicial discretion, indeterminate sentencing, parole, and the use of the parole board to determine release dates) had an even more profound influence on corrections.

2.1.3 Recent trends in penological thought

2.1.3.1 The decline of institutional rehabilitation

During the first part of the 1970's the rehabilitation model came under attack. The turning point possibly came about as the result of an article by Robert Martinson, entitled: "What Works? - Questions and Answers About Prison Reform" (1976), in which he reported that: "With few and isolated exceptions, the rehabilitative efforts that have been so far reported have had no appreciable effect on recidivism." Another contributing factor was what can be

called a “punishment orientation,” which was driven by public opinions and politicians who insisted that the mollifying of criminals should end and that offenders should get what they deserve – severer sentences with the accent on longer terms of incarceration. Specific reasons for the decline of the rehabilitation ideal can be summarised as follows:

The first, and most important, cause for its demise was that empirical studies during the seventies claimed that institutionally-based treatment was ineffective in reducing recidivism. Ward (1973) reports that a six-year study of treatment in California adult correctional institutions, which included a three-year follow-up of a thousand clients, has shown that treatment has had a negative impact on prisoners, since they (the prisoners): i) Were more hostile towards staff than those in the control group; ii) committed more serious prison violations; iii) violated parole more frequently; iv) stayed out of prison a shorter period of time before violating parole; and v) committed more serious crimes than their present offences whilst on parole. In a now famous study by Robert Martinson, in which 231 rehabilitation programs operating in different parts of the United States between 1945 and 1967 were evaluated, the writer concluded that: “...it still must be concluded that the field of corrections has not as yet found satisfactory ways to reduce recidivism by significant amounts...corrections has yet to sort out from current treatment programs or their components those techniques that are effective.” (Lipton, Martinson and Wilks 1975:627). This “nothing works” reports by various researchers also led politicians to conclude that treatment programs are a waste of money. According to Carney (1980:324): “...treatment theories are filled with high-sounding phrases, but their application did not result in any dramatic, large-scale successes.”

Critics also argued that an important reason for its failure to prevent recidivism is that the brutal environment inside prison is not conducive to treatment efforts. Critics asked how a group therapy session, for instance, can be effective when participating inmates are

afterwards returned to cells where they might be sexually assaulted and where they have to deal with the realities of survival in prison.

It has also been claimed that rehabilitation as a correctional goal is based on flawed assumptions. One reason for this notion lies in the compulsory nature of correctional treatment measures. According to Conrad (Foreword to Bartollas 1985:ix): "...researchers have concluded that attempts to rehabilitate offenders are futile unless the individual to be rehabilitated desires that outcome enough to take the initiative". A second argument in this line of reasoning is that the deterministic viewpoint, with its insistence on criminality as an illness, deprives the offender of his integrity as a rational, responsible human being (Conklin 1992:500). In the words of C.S. Lewis (1949):

To be cured against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we ought to have known better, is to be treated as a human person made in God's image.

One of the main underpinnings of the positivistic school, that offenders should be kept in prison for as long as was necessary to reform them and that the parole board would decide on release dates, also came under severe attack by advocates of the justice model (see point 2.1.3.2.1). Prisoners viewed this practice as unfair because their release dates depended on what they perceived to be the whims of the parole board. Prisoners often regarded their appearances before these boards as "stage acting" in which they had to play the part of law-abiding citizens in order to be released, and this led to considerable uncertainty and tension amongst prisoners. Forst (1982:23) mention that the Attica prison riot of 1971, which resulted in the death of 32 prisoners and 11 hostages, can largely be ascribed to convicts' dissatisfaction about this practice.

Perhaps the main objection against the rehabilitative ideal has to do with its emphasis on the individualised treatment of offenders and the concurrent ideas of sentencing discretion and sentencing disparity. Sentencing disparity refers to the fact that offenders who have committed similar crimes under more or less the same circumstances could never be certain what sentences they would receive, as it depended to a large degree on the notions of the particular sentencing official. Similar offenders may consequently receive widely divergent sentences from different judges, all under the pretext of individualised sentencing and the discretion of the court. Fogel (1975:184) describes the grievances of the justice model against discretion in this way: "Discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness. Discretion cannot be eliminated, but the justice perspective seeks to narrow, control, and make it reviewable." Von Hirsch (1976:29) cites an example where, during a conference of federal trial judges of the Second Circuit (in which judges from New York, Connecticut and Vermont were represented), facts from numerous cases were assembled from files, and each of the fifty judges was asked to lay down a suitable sentence. In one case, a crime that drew a three-year sentence from one judge got a 20-year sentence together with a \$65 000 fine from another.

A second form of sentencing disparity can be found between legislation in different countries, or even between different states in the same country (as in the United States), where large differences exist between the sentences laid down in different places for the same crimes. Reid (1981:73) cites an example of disparities of statutory penalties between New York, where the maximum sentence for the possession of drugs and narcotics is a lifetime sentence, while the state of Oregon provides for conditional release or probation for the same offence.

A third type of sentencing disparity is when improper or extralegal factors are taken into account by judicial officers. This refers to subjective or discriminatory factors, such as where

the same judge would lay down uneven judgments for different groups of people based on criteria such as societal or economic status, race, gender, etc. It is especially this type of disparity that led even liberal and critical criminologists to criticise the application of individualised sentencing, as liberals viewed the broad discretionary powers available to sentencing judges and parole boards as dangerous in terms of its potential to discriminate against people of minority groups, women, etc. Conservatives, on the other hand, felt that offenders were not treated harshly enough.

The failure of rehabilitation as the leading motive of punishment (in many parts of the United States, at least) led to three mainstreams of thought since the 1970's:

- On the one hand some people were convinced that the treatment of criminals was not working, and that a return to the principles of the classical school was needed to deter people from committing crime. The neo-utilistic punishment model and the justice model are examples of this line of argument.
- The opposite view is that treatment is too good an idea to abandon. Even though supporters admit that treatment in the institutional context had been a failure, it is felt that community-based corrections have a much better chance of success (Carney 1980:94).
- A third development of recent origin emphasises the rights of victims and the notion of restoration.

These approaches will subsequently be discussed in more detail.

2.1.3.2 The resurgence of classicism: The justice model and the neo-utilitarian punishment model

The onslaught on rehabilitation as the main motive for punishment was led by protagonists of a return to the pure classical school of Beccaria and Bentham, and this approach is sometimes referred to as the neo-classical school. Their thoughts were embodied in two divergent models:

1. The justice model of especially David Fogel, and
2. the neo-utilistic punishment model of James Wilson and Ernest van den Haag.

2.1.3.2.1 The justice model

The justice model of corrections of David Fogel (1975) emerged more or less concurrently with the downfall of the rehabilitation model. According to Charles Goodell, Chairman of the Committee for the Study of Incarceration, (*Foreword to Von Hirsch 1976:xv*) the justice model came about as the result of a growing disenchantment with the disparities and irrationalities of the sentencing process. The main viewpoints of the justice model can be outlined as follows:

1. The main goal of the justice model is to bring about justice (or “fairness”) to the correctional scene (Von Hirsch 1976:4). In the light of the injustices that emanated from the ideas and application of the rehabilitative view, Fogel suggested that justice (and more specifically equal treatment under the law) should be the leading motive of the administration of justice, not merely in philosophical context but particularly in practice. Fogel (*quoted in Bartollas 1985:48*) viewed justice as a more attainable goal for the criminal justice system than rehabilitation: “...that should be achieved through fair, reasonable, humane and constitutional practices.”
2. Due to the classical school is the principle of a free will, which is equivalent to an indeterministic view of responsibility and accountability. In this sense, offenders are

seen as volitional and rational beings that are able to distinguish between right and wrong. A logical conclusion is that offenders deserve to be punished, based on the principles of the retributive motive of punishment (see point 2.2.1).

3. Another fundamental underpinning of the justice model is an uncompromising distrust in the power of the state. Part of the criticism against the tenets of the positivistic school can indeed be seen as a reaction against the overuse of state power: mainly by exerting excessive force (in the form of longer periods of imprisonment than what the offender deserves) as a means to achieve some social good. Von Hirsch (1976:30) remarks that it should be kept in mind that courts, parole boards and correctional agencies are bureaucracies, and when organisations such as these are given too much discretion, they tend to use it to deal with their management problems instead of applying it to the advantage of the individual¹. Fogel refers in this regard specifically to the abuse of power by:

- a. Judicial officers as a consequence of sentencing discretion.
- b. Parole boards in deciding on release dates.
- c. Correctional administrators by denying the due process rights of inmates.

4. Further to point 3, the justice model also holds to the bankruptcy of the rehabilitative concept. As a former correctional practitioner, Fogel saw that rehabilitative philosophy actually perpetuated the abuses of the system and often resulted in punishment rather than treatment (*quoted in Bartollas 1985:49*).

¹ This misuse of discretion can be seen in the State's use of parole as a release mechanism to relieve prison congestion. This eventually led to critics denouncing the measure as such rather than recognising its failure to be due to its misapplication.

5. The justice model proposes limitations on the use of incarceration as a punishment. Charles E. Goodell, Chairman of the Committee for the Study of Incarceration (Foreword to Von Hirsch 1976:xvii), sums up their position with regard to the restricted use of incarceration:
- Only offenders convicted of serious offences would be confined. Even for such offenders, the duration of confinement would be strictly rationed: instead of the ten-, fifteen-, and twenty-year sentences now imposed, we would allow very few sentences exceeding three years.
 - Alternatives to incarceration for the bulk of criminal offenses - namely, for those which do not qualify as serious. These alternatives would not be rehabilitative measures but, simply and explicitly, less severe punishments. Warnings, limited deprivations of leisure time, and, perhaps, fines would be used in lieu of imprisonment.
 - Sharply scaled-down penalties for first offenders. The sentence would depend not only on the seriousness of the crime of which the defendant now stands convicted but also on his record of prior offenses.
6. A last important concern of the justice model is for the consumer of the justice system, referring to all the parties concerned (such as the community, the victim, the juror, the witness, and the offender), accompanied by the motto of "justice-as-fairness." Some of the proposals made by Fogel to give substance to this principle are that:
- Officials of the criminal justice systems should have as much concern for victims of crime as they have for offenders.
 - Adequate grievance procedures should be present in prisons.
 - The appointment of an ombudsman is an effective way of ensuring fairness in prisons.
 - Treatment and vocational programs in prisons should be voluntary. Those who wish not to participate should not be discriminated against in terms of their release dates.
 - Prison guards need better training, a safe environment, upgraded job classification, and a better salary to match their difficult jobs.

- Even the rights of residual and dangerous offenders should be safeguarded.

The other main movement in the return to classical ideals is the neo-utilitarian punishment model.

2.1.3.2.2 The Neo-utilitarian Punishment Model

The neo-utilitarian approach can essentially be described as a “hard-line” approach towards criminals. James Q. Wilson and Ernest van den Haag, its main advocates, charge that, where rehabilitation had been unable to prevent offenders from re-offending, law-breakers can at least be effectively confined. They also believe that incarceration that is severe enough will deter potential criminals from committing crime. The main principles of the neo-utilitarian punishment model are as follows:

1. Proponents of utilitarian punishment firstly believe that government has a paramount duty to protect the lives, liberties, and pursuit of happiness of its citizens. It is evident that this stance is closely related to Bentham’s “greatest happiness principle” (see point 2.1.1.1), according to which punishment should serve the interests of the greatest number of people. The utilitarians also deem the surge in crimes such as robbery, auto theft and murder in the United States as a direct result of the reduced use of punishment in the decades prior to the 1970’s, and maintain that it is the duty of the government to correct this situation by increasing the severity of punishment.
2. Proponents of this model are of the contention that sufficient punishment will deter criminal behaviour. James Q. Wilson (*cited in Bartollas & Conrad 1992:127*) explains this viewpoint as follows:

Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating their chances, ponder our reaction to wickedness as a clue to what they might profitably

do. Our actions speak louder than our words. When we profess to believe in deterrence and to value justice, but refuse to spend the energy and money required to produce either, we are sending a clear signal that we think safe streets, unlike all other great public goods, can be had on the cheap. We thereby trifle with the wicked, make sport of the innocent, and encourage the calculators. Justice suffers, and so do we all.

Other factors emanating from their stance on deterrence include:

- That predatory street crime is far more serious than white-collar crime and should therefore be the focus of the attention of criminal justice.
 - That repeat offenders inflict serious harm upon society and should be severely punished.
 - That offenders will be deterred from crime only if they are made to realise that crime will lead to isolation from the community (referring to imprisonment).
 - That prisons are not supposed to be pleasant places, and that the prison experience should be made unpleasant that people will desist from wanting to go there.
3. Although proponents of this model validate punishment around its social utility, they also support just deserts philosophy (referring to the proportionality of punishment to crime). They believe, nonetheless, that just deserts should be subservient to the social utility of deterrence. This implies that, if it is deemed advantageous for the community to punish offenders more severely than they deserve to serve the purpose of deterrence, that this conviction should carry more weight.
4. Just as with the justice model, proponents of utilitarianism believe in the indeterministic view of responsibility, namely that offenders can reason and have freely chosen to violate the law (the free-will principle), and that they therefore deserve to be punished for the harm they have inflicted upon society.

It should be obvious from this summary that, although both models mentioned above are based on the return to the principles of the classical school, their interpretations of these principles differ widely.

2.1.3.2.3 The effects of the neo-classical school

2.1.3.2.3.1 Structured sentencing

One of the most significant outcomes of the neo-classical movement (referring to both the justice model and the neo-utilitarian punishment model) was the introduction of a “structured” sentencing approach in America. According to judge Frankel (1972b:901), sentencing guidelines were meant “ to put boundaries on [judicial] discretion, enhance fairness, promote certainty and systematic planning, and end racial discrimination... .” On the federal level, the United States Sentencing Commission introduced federal sentencing guidelines that were implemented in 1987, whilst a number of states also changed their previously indeterminate sentencing systems into ones based on the principles of determinate sentencing and the use of sentencing-guidelines.

Structured sentencing normally refers to a two-dimensional sentencing grid, where the one axis represents the seriousness-level of the offence, and the other the number of previous convictions. As one of the founders of the justice model, Von Hirsch (1976:132) suggested that: “A presumptive sentence should be prescribed for each gradation of seriousness – with limited discretionary authority to raise or lower it for aggravating or mitigating circumstances.” In practice this implies that a sentencing official will read off the prescribed sentence for each offence by lining up the number of previous convictions with the seriousness of the offence, and has only limited discretion (normally ten per cent in either direction) to take aggravating or mitigating circumstances into consideration. Important with regard to this gradation of penalties is the justice model’s restrictions on the duration of imprisonment (see point 2.1.3.2.1). Convicts normally have to serve the whole term without provision for parole, although they could earn a reduction of time for good behaviour.

The best known system of presumptive sentencing guidelines is that of Minnesota which led the way with the announcement, in 1980, of a three-part strategy, consisting of the appointment of a sentencing commission, the drafting of presumptive guidelines¹ and the creation of an appellate sentencing review body who had to ensure that judges did not deviate too far from these guidelines (Tonry 1999a:7). The Minnesota system was by and large successful, and sentencing disparities related to race, gender and geographical region were reduced (*Ibid.*, p.9).

The trend toward determinate sentencing continued to win support throughout the 1980's, and, in 2001, federal courts as well as about one-third of the states of the USA made use of structured sentencing (Mauer 2001:11). What is important to notice, is that the majority of states still cling to the indeterminate structure, and that hybrid determinate and indeterminate systems exist in many states (Griset 2002:1).

2.1.3.2.3.2 The “tough on crime” movement

Closely coupled to the structured sentencing movement in the United States is the “war on crime,” in general, and the “war on drugs,” in particular, that was launched by the Reagan Administration in the early 1980's. According to Mauer (2001:11), law enforcement attention to drug offences increased dramatically, with a doubling of drug arrests in the 1980's and a record 1.6 million arrests by 1998. Heeding to public concerns about the crime problem and fear of crime, politicians embraced the “war on crime” idea which led to tougher legislation, especially on the terrain of drug trafficking. Mauer (2001:14-17) provides four reasons for the “tough on crime” movement in the United States:

¹ According to Tonry (1999a:7) presumptive guidelines are called so because of the presumption that cases should be handled in accordance with applicable guideline ranges.

1. The politicisation of crime where, since the 1960s, politicians have progressively made the crime problem a central issue in their presidential campaigns;
2. The American culture of individualism, which makes it easier to concentrate on punishing the individual instead of looking for communal solutions.
3. A growing political climate that is particularly associated with increasingly harsh attitudes towards immigrants and members of marginalized groups.
4. The increasingly marginalized character in terms of wealth of the American society, that divides people and makes it easier for the well-off to advocate punishment for those less fortunate.

From the “tough on crime” approach emanated measures designed on the one hand to make sentences more severe, and on the other hand to limit the discretionary powers of judges.

These measures are:

1. “Mandatory minimum sentences” which, according to Mauer (2001:14), were employed across all states in 2000,
2. The “three strikes and you’re out” policy¹ that is employed in half the states,
3. and “truth in sentencing” statutes².

The effect of these measures (mandatory minimum sentences, the “three strikes” policy and the “truth in sentencing” statutes) may be regarded as even more substantial than structured sentences, since they are far more widely applied. In the USA, these measures led, in particular, to an enormous growth in the prison population, even though crime figures, as such, have decreased somewhat over the last few years.

¹ Where normally a lifetime-sentence is mandatory for offenders who are convicted for a third time on a felony offence.

² Which determines that violent offenders, in particular, should spend the largest portion of their sentences in prison (in most cases at least 85 per cent).

2.1.3.2.3.3 Disadvantages of structured sentencing

The structuring of sentences is, however, quite unpopular with certain groups, especially sentencing officials and scholars, who still support the principles of positivism and treatment as the main motive for criminal justice. Michael Tonry (1993:131) remarks that the federal guidelines, in particular, are among the most controversial and disliked sentence reform initiatives in the history of the USA. Judicial officers criticise these guidelines on the grounds that they limit judicial discretion inordinately, that they are too complex, and that offenders of whom the background particulars differ widely receive the same sentences. Another objection is that they are too severe, and that they aggravate prison overcrowding.

Apart from the personal misgivings of some parties, sentencing guidelines have also had some negative consequences that were probably unforeseen by those who came up with the idea. They are:

1. Its potential for abuse by politicians and legislators: In contrast to the original ideas of the justice model, which suggested strict limitation of punishment within the structured sentencing system (see point 2.1.3.2.1), legislators - often motivated by public opinion - soon started to abuse them by lengthening prescribed sentences¹. Minnesota, for instance, doubled the presumptive lengths of all prison sentences in 1990 (Tonry 1999a:9).
2. The potential for abuse by prosecutors: The high penalties accompanying certain crimes, and more specifically the use of mandatory minimum sentences and the three strikes stipulation, provides leverage for prosecutors to plea bargain from a very strong

¹ The ease with which legislators can change a structured sentencing system is aptly described by Zimring (1976), who stated that: "...if sentencing standards can be expressed as numbers written on a blackboard, all that is needed to change them is an eraser and the political will."

position¹. Apart from the fact that this obstructs due process, this situation actually results in decision-making being transferred from the judge to the prosecutor. Where sentencing guidelines largely removes the discretion of sentencing officials, the practical outcome is that the decision-making process is just reverted one step back, giving the prosecutor the powers to determine the lengths of sentences.

2.1.3.3 Re-affirmation of the rehabilitation ideal

The developments on the terrain of structured sentencing did not affect all states to the same degree, as mentioned under point 2.1.3.2.3.2. Furthermore, Robinson (1999:423) remarks that the rehabilitative ideal have never been totally abandoned since the 1970's and that various commentators have re-affirmed rehabilitation in a variety of guises.

Supporters of the rehabilitation model reject Martinson's findings that "nothing works" and claim various examples of programs that have been empirically shown to be effective:

¹ As an example of what can go wrong with a structured sentencing system that is misused by legislators and prosecutors, Griset (2002) debates the Florida case, where state prosecutors were responsible for drafting legislation. The Criminal Punishment Code (CPC) that came into effect in 1997, made provision for guideline scores (which are relatively low) to be computed, but stipulates that judges are free to ignore them and impose any sentence up to the long statutory maximums of the old indeterminate sentencing system, which provided for five years imprisonment for a third degree felony offence, 15 years for second degree, 30 years for first degree, life and the death penalty (*Ibid.*, p.3). This code furthermore stipulates that no appeal against a maximum sentence would be possible, because maximum sentences are held to be presumptively correct, but that prosecutors would have the right to appeal any departure that is lower than the minimum. The CPC also prohibited judges from considering defendants' addiction problems into account as mitigating factors in sentencing (*Ibid.*, p.4). The result of this legislation is that prosecutors can plea bargain down from whatever the statutory maximum sentence for a specific offence is, and are no longer limited by the more lenient sentences prescribed in the sentencing guidelines.

- Community alcohol and drug treatment, where it was found that community-based substance abuse treatment reduces the likelihood of re-arrest.
- Community sex offender treatment, where it was shown that a mixture of supervision, treatment and polygraph usage to be effective in reducing sex offender recidivism.
- Cognitive skills development has also been shown to reduce re-offending.

According to Albrecht (1998:71), rehabilitation must address characteristics that are dynamic (that can be changed, in other words) and are strongly correlated with crime. Some of these dynamic correlates are perceptions and attitudes toward employment, education, peer influence, drug use, and antisocial values and cognitions.

Proponents of correctional treatment also argued that rehabilitation has yet to be given a fair chance, and that, as knowledge increases, new developments on the terrains of diagnosis and treatment will lead to more positive outcomes.

2.1.3.4 Restorative Justice

Restorative justice, also known as reparative justice or community justice, is a fairly recent development in corrections. Its prominence can be ascribed to two factors:

1. Its popularity among the public, who seems keen on the idea that offenders should take personal responsibility for their crimes by paying back victims and the community, and
2. the lobbying of victim's rights movements in First World countries who have, for a long time, complained that the criminal justice system had lost sight of the rights of victims, using them only as witnesses to crimes against the state.

As the term indicates, restorative justice seeks to restore the situation with regard to the victim, the offender, and the community, to such a level of functioning as more or less existed before the crime took place. As such, its ideas are not new, but actually stretches back to ancient times when offenders were held personally accountable to their victims and to the community. Programs that are normally associated with restorative justice are:

- **Victim-offender reconciliation programs** where offenders and victims are brought together to discuss the effects of the crime and to determine how restitution can be made to the victim.
- **Family group conferencing** that are similar to victim-offender reconciliation, but specifically involve family members in the deliberations.
- **Victim assistance programs** that offer help to victims during their exposure to the criminal justice process and thereafter.
- **Prisoner assistance programs** that provide services to prisoners and their families during their stay in prison and after release.
- **Victim-offender panels** that assemble groups of unrelated victims and offenders, linked by a common type of crime but not by the particular crimes that have involved the others.

As for how it fits into the present penal system, the restorative justice approach calls for offenders to admit what they have done wrong (to show remorse) and to take steps to compensate the victim. There are primarily two ways in which these objectives can be realised in the correctional setting:

1. **Restitution**, where it is required of the offender to repay the victim to compensate for the harm done, and

2. community service, which can be seen as a symbolic restitution where work done by the offender in the community without payment shows the offender's remorse and willingness to amend the wrong.

There are, nonetheless, several other questions about the application and applicability of restorative justice that require further attention. This matter will receive closer attention in point 5.2.

2.2 JUSTICE AND RETRIBUTION

Central to this study, and the situation in corrections in general, is the issue of justice, as mentioned in chapter 1. The question of justice, or "fairness" as Fogel (1975) refers to it, essentially has to do with the reaffirmation of retribution as the main motive of punishment. The reason for the discussion of this topic is that retribution, especially in academic circles, has for long been downplayed as revenge, implying that it necessarily involves, as Ives contends in his classical work: "...concessions allowed to unreasoning cruelty." (1970:vi). Some writers, such as Tappan (1960:241), Reid (1981) and Glaser (1997:35) subsequently refers to it as "communal vengeance," viewing it as archaic and out of line with modern trends in correctional thinking. Recent changes in criminal justice philosophy, especially the movement towards the classical ideals of proportionality and just deserts, brought a renewed interest in the basic tenets of the motive of retribution. Apart from the historical precedents, it is also important to clearly state the author's viewpoint in this regard because of its central role in the argumentation followed in this study.

2.2.1 What is retribution?

Retribution can at once be seen as a straightforward and simple concept, but also as an immensely complicated philosophical issue, which has occupied and perplexed some of the

greatest minds on the fields of law, philosophy, and criminology. In its simplest terms, retribution can be described as punishment by the state to repay injustice. A term that is closely related is "just deserts" - referring to the deservedness of punishment by the offender. Caldwell (1956:390) describes retribution as "... the pain which...a criminal deserves to suffer [his just deserts] because he has broken the law and hurt someone else." Retribution is also often described in monetary terms, namely that the offender has incurred a "debt" as a result of his crime and that he consequently "owes" something to society. This debt should be "repaid" by suffering punishment.

Retribution is not only concerned with the fact of repayment. Another provision is that the repayment should be proportionate to the crime committed (sometimes expressed as "quantitative retribution"). In this sense, retribution is closely related to justice itself. This relationship is illustrated by the universal symbol of justice, that is the Roman goddess *Justitia*, holding a scale (the scale of justice) in her one hand and a sword in the other. The scale is supposed to equal the damage produced by the crime with an equal punishment wrecked upon the offender. The balance of justice is then figuratively restored, even if it would be impossible to actually recreate the situation as it was before the crime.

A third qualification of retribution is that there should, at least, be minimal culpability on the side of the accused (Simons 2001:244). The relationship between culpability and wrongdoing would then qualify the deservedness of punishment, or the just deserts that it is right for the state to apply.

In response to the critics of retribution, it should be mentioned that retribution must be clearly distinguished from its earlier predecessor, revenge. Although revenge also aims to repay injustices, retribution involves an independent and objective third party (the state), and not, as in the case of revenge, the injured party himself or his family. Although many critics regard

retribution as nothing more than “official revenge,” the advantages of this approach over revenge are that:

1. The state acts independently and is therefore in a better position to consider the interests of all parties.
2. By being independent, the state is also in a better position to apply sentences that are equal to the harm done.
3. Personal revenge, or blood vengeance, which in the past often proved to be socially destructive, is prevented.
4. Retribution eliminates feelings of personal satisfaction because the punisher is not subjectively involved and is therefore free from any personal gains as a result of his or her decision.

Retribution has an absolute character. One can distinguish between it and the other three motives of punishment (deterrence, protection of the community, reformation of the offender) in terms thereof that retribution looks back at the crime that has been committed while the other three motives look forward to see what good can be attained by applying it. As such, retribution does not require any utilitarian value (any good to be produced by applying it), but merely aims to repay the offender for what he or she has done. There is therefore a causal effect attached to retribution, in a philosophical sense, in that punishment can be seen as a logical consequence of crime.

The famous German philosopher, Immanuel Kant (1724-1804), is an advocate of retribution in its purest sense. This implies that punishment is a categorical imperative and that no other purpose is necessarily to be served by punishing someone but the fact that he or she deserves it. The following passage is from Kant's *Rechtslehre* (Sections 331, 333):

Juridical punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all

cases be imposed only because the individual on whom it is inflicted has committed a crime. Even if a civil society were to dissolve itself by vote of all its members (e.g. if a people, inhabiting an island, were to resolve to separate from one another and scatter themselves over the surface of the globe) nevertheless, before they go, the last murderer in prison must be executed.

This excerpt makes it clear that Kant believes punishment as so fundamental that absolutely no other reason, except for the fact that a crime has been committed and that there must be some degree of culpability, is necessary to justify it.

George Hegel (1770-1831) based his justification for retribution on its “dialectical necessity.” According to Hegel, the demand for retribution stems from the very concept of justice, which is absolute. Crime, as a rebellion against justice, can be seen as a negation of it and - because the concept of justice is unassailable - crime actually implies that justice is contradicted and allowed only an apparent existence (in other words actual justice does not exist any more). The logical rectification of this situation is to restore justice by punishing the offender (Blanchard 1968:72).

It is apparent from these viewpoints that, although retribution may have some practical value (such as maintaining social solidarity, giving the offender an opportunity to atone for his wrongdoings and satisfying people that justice had been done) that there is something of a built-in imperative attached to it, namely that “justice needs to be done because justice needs to be done,” and not because any utilitarian function is to be served by it.

2.2.2 Necessity for the central role of retribution in justice

Critical to the retribution stance is the logical imperative to use it as the main motive of punishment, with the utilitarian motives secondary, as a prerequisite for justice or fairness.

The main argument in this regard is simply that, if either general deterrence, specific deterrence, protection of the community or rehabilitation was to be used as the main motive of punishment, without adhering to the basic principles of retribution, namely deservedness (just deserts) and proportionality, that it invariably leads to injustices. Taking, in other words, the past guilt into account, limits the extent of the punishment which it is right to inflict. The best way to illustrate this principle is by way of an example: If general deterrence, for instance, was to be used as the main motive of punishment, without taking the amount of guilt emanating from the crime committed into account, it would be plausible in a utilitarian sense ("the happiness of the greatest number") to lay down punishments that would really make potential offenders think twice, such as ten years imprisonment for parking offences, or life sentences for shop-lifters. It would even be right to punish innocent people, just as long as they are thought to be guilty by the public. In the same vein, preventative punishment would make sense in terms of specific deterrence or protection of the community.

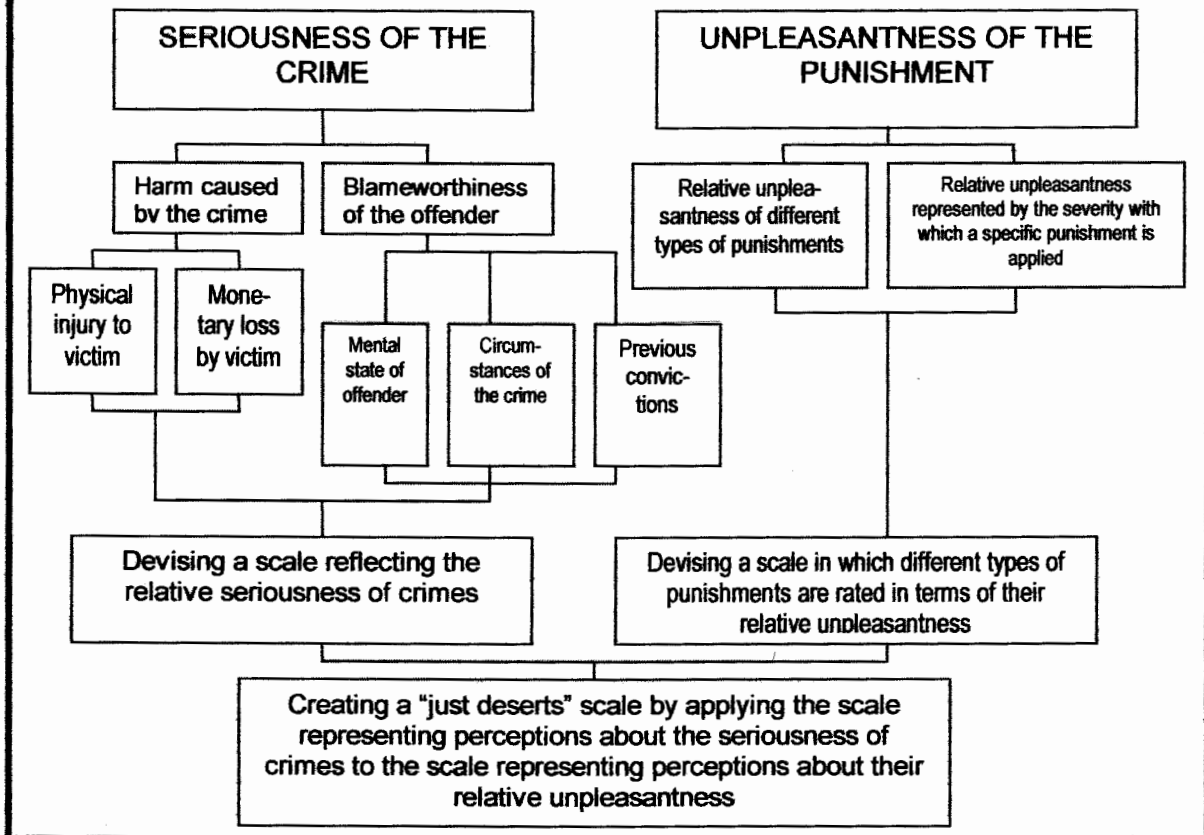
Although such arguments may sound far-fetched and unreasonable in an enlightened age, where the emphasis is on humanistic principles, these dangers have been shown to be real in the history of punishment as is pointed out under point 2.3.

2.2.3 Translating just deserts into just sentences

Even though the principle of retribution, or just deserts, seems indispensable, the problem remains how to put the idea of proportionality into practice, in other words, how much of a particular punishment (such as imprisonment) should be laid down for a specific crime?

The following exposition of just deserts is by Oliver (1999:55), and is based on literature on the scaling of various factors related to just deserts:

DIAGRAM 2-1: STRUCTURE OF JUST DESERTS DECISIONS



This diagram can be explained as follows: According to Conklin (1992:472), a workable system of retribution or just deserts requires the rank-ordering of:

1. Crimes by their relative seriousness, and
2. punishments by their relative unpleasantness.

This implies that two scales must be devised: The first a subjective scale based on how people rank crimes according to their relative seriousness, and the second a scale consisting of opinions about the relative severity or unpleasantness of punishments. According to the scheme above, devising punishment that fits the crime (just deserts) consists of applying the seriousness scale to the unpleasantness scale (*ibid.*, p.472).

As for the seriousness of various crimes, two further criteria should be differentiated, namely the "harm caused by the crime" and the "blameworthiness of the criminal." (Bedau 1977, Warr 1989). Sellin & Wolfgang (1964) further assigned values to two different components of a crime, that is the amount of injury to the victim and the amount of monetary loss, and accordingly compiled a summary score for each offence. Widespread agreement between samples in different countries regarding the ranking of the crimes was found (Conklin 1992:473). In addition, Warr (1989) has shown that perceptions on the seriousness of crimes can be broken down into two distinct criteria: the "harm" caused by it, and its "wrongfulness," which is a normative evaluation of crime.

To determine the blameworthiness of an offender has proven somewhat more problematic. According to the strict classical idea proposed by Beccaria, attention should be focused exclusive on the crime (in other words the harmfulness thereof), making determination of blameworthiness unnecessary. The neo-classicists, however, reasoned that it would be more appropriate to consider the blameworthiness of the offender together with the harm done by him when laying down just sentences.

According to Conklin (1992:472-3), determining blameworthiness consists of two steps: firstly by determining the motivation or mental state of the offender, and secondly, by taking the circumstances surrounding the crime into account. A peripheral offender, for example, might be treated as less blameworthy than someone who plans and perpetrates a crime alone. Thirdly and most importantly, past convictions is universally accepted as an aggravating factor when the blameworthiness of an offender must be determined.

Determining how unpleasant different types of punishments are has proved to be an intricate process. Erickson & Gibbs (1979) devised a scale whereby respondents had to equate the severity of different penalties in comparison with a standard of one year in [an American] jail.

On these grounds, they determined that a one year jail sentence is equal to the equivalent of a six months prison sentence; 7,8 years probation; or a fine of about \$3000. The data in different countries would obviously differ, depending on the range of available penalties and the differences in perceptions. To find common grounds for standardising the punitive values of different types of sentences is not as easy as it seems. Firstly, two years imprisonment can not necessarily be seen as twice as punitive than one year imprisonment. In the second place, if it was shown in this study that, even if the public in a certain sample equates one year imprisonment with, say, five years probation, this does not necessarily mean that two years imprisonment will be equal to ten years probation. Thirdly, it must be remembered that such estimations are often vague, subjective, and culture bound, and may only reflect the mood of the times.

The main dilemma with an exposition such as this one is that all of these criteria subsequently depend on subjective evaluations, in other words if a scale could be devised for each one of these criteria, different individuals, cultural groups, and judges would probably have diverse ideas on the relative significance of the criteria involved and how these facts should be translated into just sentences. Just deserts can thus largely be seen as a subjective and culture-bound phenomenon, lacking an empirical foundation with which to provide justice in an absolute way.

The possible complexities of determining what constitutes just deserts in the minds of people do not negate its necessity to convince people that "justice has been done". According to Roger Hood (1962:17):

The sociological theories of punishment rest upon the assumption that punishment for crimes should be related to the moral conscience of the community on whose behalf it is being inflicted. Unless the aims of punishment take into account the sensibility of the community, the penal system will not serve one of its primary functions, that is, to maintain communal stability.

When people perceive sentences handed down as too lenient, they normally interpret it as an unwillingness or inability of the authorities to maintain justice. According to Harlow, Darley & Robinson: "...penal system practices should be in accord with community views because the community is not likely to stand for them if there exists widespread sentiment that criminals are not receiving their just deserts" (1995:73).

2.3 SUMMARY AND EVALUATION

Chapter 3 will finally recapitulate the development of penological ideas and try to explain it from of a retributive viewpoint. This summation will again make use of the following three headings:

1. The underpinnings of penological thought: the classical and positivistic schools.
2. The development of the prison.
3. Recent developments on the terrain.

2.3.1 The classical and positivistic schools

The barbaric practices of the Middle Ages came under scrutiny during a major intellectual upheaval in the 18th Century that today is known as the "Era of Enlightenment." Cesare Beccaria, the central figure of the classical school of criminology, was strongly influenced by the writings of Montesquieu and Voltaire, especially by their views on utilitarianism and humanitarianism. From this perspective he strongly reacted against the practices of his day such as judicial discretion, capital punishment, torture, secret accusations, and disproportionate punishment. He was of the opinion that punishment should only be used to deter people from committing crime and to protect society. Because man is seen as a rational being, it was argued that people were able to make decisions and to choose between right and wrong. They could therefore be held responsible for their actions and therefore deserved

to be punished. The central principle of this movement was that “the punishment should fit the crime,” and this proportionality between crimes and punishment was meant to counteract the injustices of the Middle Ages that resulted from the unfettered use of discretion by the judges of his day.

The second school of thought in the late 19th century, whose main proponents were Lombroso and Ferri, held the view that crime could be dealt with more efficiently by reforming the offender. Their arguments were based on the contention that developments in the social sciences would enable scientists to analyse criminogenic factors and to pinpoint the various reasons why people commit crime. By diagnosing offenders to determine their specific problems, prisons would act as treatment centres where individualised treatment would be rendered. Components of this school reacted strongly against the classical school, and argued that individual treatment would be much more effective in preventing recidivism than mere punishment. This viewpoint became known as the positivistic school and their main tenet is that “the punishment should fit the criminal.”

When comparing the ideologies of the positivists and the classical school, a salient conclusion that can be drawn is that it is not the classicists’ idea of deterrence and protection of the community against which the positivists reacted (as rehabilitation also aims to protect society and deter offenders from re-committing crime by means of reformation). Its reaction is actually against the underlying principle of retribution, according to which the punishment should be proportionate to the crime committed. As mentioned by Oliver (1998a:91), the positivistic school attempted “...to shift the goalposts of justice...”, replacing the notion of just deserts with an attempt to rehabilitate the offender, in other words to remove the “deservedness” factor from justice and to substitute it with a scientific strategy that would reform offenders without having to submit to the moral values of just deserts.

2.3.2 The development of the prison

The development of prisons can be seen as a direct result of the new directions in punitive philosophy (the classical and positivistic schools) as the prison fitted both schools' philosophies as a correctional tool. As for the classical school's suggestion that the punishment should fit the crime, prisons provided an ideal way of matching punishment and crime by enabling the state to detain offenders for variable lengths of time. For the positivists prisons provided the venues that they needed to apply their regiments of classification and treatment. When looking at the development of the prison, it must be mentioned that prisons at no stage during its history focused exclusively on one of these strategies to the total exclusion of the other - imprisonment always contained elements of retribution, deterrence, incapacitation, as well as an underlying aspiration to make better persons of those being detained. The differences should rather be seen as in emphasis and in aims.

Some of the earliest prisons based on the principles of the classical school were the Walnut Street Jail (1790), the Eastern State Penitentiary (1818), and the Auburn Silent System (1815). These prisons held the belief that isolating prisoners would prevent criminal contamination and would give convicts time to reflect on what they did wrong. The Walnut Street Jail and the Eastern State Penitentiary did so by physically isolating inmates, while the Auburn system prevented prisoners from communicating with each other.

When evaluating the earliest prisons, it is obvious that they were intended to reflect the principles of the Enlightenment, that the whipping posts and the gallows of the past should be replaced by more humane, rehabilitation-oriented incarceration of offenders. Unfortunately this attempt at a positive and scientific way of reforming offenders proved to be just as severe as the previous system. This time the damage to offenders was of a mental rather than physical kind.

In 1870 a new wave of optimism led to the introduction of a progressive classification system that was based on the penal experiments by Alexander Maconochie in Australia and Sir Walter Crofton in Ireland. Maconochie and Crofton developed marks systems whereby prisoners could earn an early release date based on their cooperation with various prison programs. The two main ideas on which the transformation in American corrections centred, were that: a) rewards systems were to be introduced, to encourage prisoners to work towards their own rehabilitation; and b) reformation, not vindictive punishment, should be the main purpose of incarceration. The Elmira Reformatory is the best-known example of an institution based on these ideas. Actually, the principles upon which this prison was based are quite modern, and, in many respects, sound as if they rather belong to the regimen of an institution built today. Unfortunately, the programs proposed in this model proved to be too difficult for most inmates, and in the end warders had to resort to punishment to maintain discipline, which defied the ideals of the humane treatment of prisoners and led to its demise. The failure of the reformatory was actually quite significant, as it reflects to a large extent the failure of the modern prison, where good intentions are not replicated into success figures. To state it bluntly: prisons do not seem to be places where reformation is possible, and often result in bringing about the worse in people instead of improving them.

In the 1920's, a different approach was tried out. The medical model went all the way in terms of a positivistic convention and was based on an exclusively deterministic viewpoint, according to which treatment and rehabilitation should be the sole goals of incarceration. The prison was turned into a mental hospital; warders were replaced by nurses and the warden by a psychotherapist. Two additional tools were introduced to assist them in this effort: The indeterminate sentence (according to which prisoners' stay in prison would depend on the time it would take to rehabilitate them) and the appointment of a parole board (that consisted of experts who decided on the release date of convicts). Under the guise of reformation and benevolence, state power over the individual became absolute. Parallel with developments in

mental asylums, the prison became a place where the lives of "patients" were almost totally controlled by professionals who had extensive decision-making powers to determine their futures.

Although the tenets of the medical model were never fully incorporated into most sentencing and correctional systems in the world (the medical model was a limited experiment even in the United States), its influence on practices such as the individualisation of sentences, wide-ranging discretionary powers of sentencing officials, indeterminate sentences, the use of parole, and the use of the parole board to determine release dates has had large appeal in almost all countries. The important question to be asked in this regard is why this model is so popular?

One of the reasons why the medical model was (and still is) so popular among correctional administrators is the fact that it is almost impossible to criticise. Most of the decisions regarding sentencing and rehabilitation were placed in the hands of experts (social workers, psychologists, psychiatrists, and other social scientists), and because of the individualised nature of treatment, any criticism would mean that the professional integrity of the person applying the treatment would have to be questioned. Decisions taken under the auspices of "applying treatment" were therefore seldom queried, and were even immune from review by appellate courts (Tonry 1999b:1). For this reason, many of the repulsive features of imprisonment could also be made palatable to the public because - as long as prisons promised to rehabilitate the offender - no real objection can be raised against it.

In conclusion it can be stated that lessons learnt from the history of prisons is particularly discouraging. The picture is one of a long list of attempts that do not work. This feeling is reiterated by Rutherford (1991:2), who remarks that: "The most striking aspect of prison reform over the last two centuries is how little of it there has been. In most instances, the

gains have been modest, tenuous and often short-lived.” The critical issue with imprisonment is thus not so much the idea of learning from its mistakes to learn something from it for the future, but the message that nothing seems to work, reflecting a bankruptcy of ideas.

2.3.3 Recent developments on the terrain of corrections

During the end of the 1960's and the beginning of the 1970's, at a time when crime volumes started to escalate in the United States, the rehabilitation motive came under attack; partly because of a theoretical return to the classical principles of justice and just deserts, and also as a result of growing public concern with crime and public insistence that the criminal justice system should stop mollifying criminals (referring to treatment strategies). Some of the specific objections lodged against the rehabilitative stance were that:

- Institutional treatment is unable to reduce recidivism.
- The prison is an unsuitable venue for rehabilitation.
- Rehabilitation is based on flawed assumptions.
- The use of the indeterminate sentence and sentencing disparity lead to injustices towards offenders.

Simultaneously with the demise of rehabilitation as the main motive of punishment, two new schools of thought became prominent, based on a return to the beliefs of the classical school of criminology. They were the justice model and the neo-utilistic punishment model.

The justice model of David Fogel held to the following principles:

- Justice as the goal of criminal justice.
- An indeterministic view of responsibility.
- Distrust in the powers of the state.

- Rejection of the rehabilitation stance.
- Limitations on the use of incarceration.
- “Justice as fairness,” referring to a concern for all parties concerned with crime: the community, the offender, the victim, and even the officials concerned in applying justice.

When evaluating the justice model, it is apparent that this model closely follows the principles of retribution as a motive of punishment, applied to a modern setting. In this regard it is strongly related to the ideals of the classical writers Beccaria and Bentham (Von Hirsch 1976:6). Even though these early writers did not mention the principle of retribution as such, Beccaria can in essence be seen as a retributivist, and his ideas on utilitarianism and deterrence should be seen as purposive missions of retribution, rather than as self-determining concepts. This notion is also supported by Beccaria’s views on the proportionality of punishment to crime, and on his criticism of sentencing discretion that, in itself, does not necessarily defy the purposes of deterrence (meaning that extreme punishments can actually serve the purposes of an exclusively deterrent viewpoint - see point 2.2.2).

In contrast with the justice model that stressed proportionality and fairness, The neo-utilistic punishment model represented more of a “hard-line” approach towards criminals, based on the premise that severer sentences and especially longer terms of imprisonment would deter them and other people from committing crime. The main beliefs of this viewpoint are that:

- The government has a duty to protect its citizens.
- The purpose of punishment is to vindicate the legal order.
- That punishment, if severe enough, will deter.
- Conditional support for the just deserts principle.

- Belief in the free-will principle.

The neo-utilitarian punishment model which, to a large extent, embodies public support for a “tougher” stance against law-breakers, exerts a major influence on correctional thought today, especially in the United States. Some of the latest developments such as mandatory minimum sentences, “truth-in-sentencing” practices, and the “three-strikes-and-you’re-out” concept, are direct results of this school of thought.

The main consequence of the return to the classical ideology of just deserts and the making the “punishment fit the crime” idea of Beccaria was the introduction of structured sentencing in the 1980’s, according to which the penalties for certain crime categories (taking account the previous convictions of offenders) would be prescribed by legislation, and which greatly reduced the discretionary powers of judges.

Although the initial idea with structured sentencing was to reduce prison sentences and to limit the use of incarceration in an effort to be more fair, “war on crime” politics in American from the 1980’s onwards led to the hijacking of sentencing guidelines to serve the purposes of a firm stance against crime in general, but also against some crime categories, such as drug offences, in particular. Additional practices fitting in with a structured approach, such as mandatory minimum sentences, “three strikes,” and “truth-in-sentencing” practices, also led to an unprecedented escalation in prison numbers.

When comparing the positions of the neo-utilistic model and the justice school, it would seem that the differences between them are mainly theoretical, even though both are based on the premises of the classical school. The justice model, on the one hand, stresses the retributive concept of just deserts (in other words proportionality), whilst the neo-utilistic punishment model focuses more on the deterrent or discouraging effect of punishment. What is especially

important regarding their differences are the practical ramifications. Where the justice model proposes that sentences should be less severe, many writers on American corrections agree that the “punishment paradigm” has led, in fact, to severer punishments – referring to the greater use of imprisonment and also to longer terms of incarceration.

Although writers sometimes refer to the hard-line stance as the “justice model” (Robinson 1999:423, 424, Rosenfeld & Kempf 1991:482), it is obvious that what is actually at stake are the principles of the neo-utilistic punishment model. To a certain extent, the ideas proposed by the justice model can be seen to have been “hijacked” by punitive public opinions that, in turn, encouraged politicians and legislators to abuse the idea of just deserts by making punishments more, and not less, severe. Practices such as mandatory minimum sentences, “truth-in-sentencing” practices, and the “three-strikes” concept, are clearly not in line with the proportionality principle of the justice model, but rather aim to deter would-be or real offenders from committing or recommitting crime.

The core problem with the use of structured sentencing in this way, is that the same argument that was lodged against indeterminate sentencing - that it constitutes an abuse of state power against the individual - can also be used to criticise the determinate sentencing system because of its severe measures¹. In other words, although discretion is controlled by guidelines, none of its original ideas, that is to enhance fairness, promote certainty and systematic planning, and end racial discrimination have been realised. If seen from a

¹ Duster (1995:21) recalls the case in September 1989 of a federal judge in San Francisco openly weeping because new federal laws stipulated that he sentenced a first-time offender to ten years in prison. The case involved a man who worked for 24 years as a longshoreman, and who had a reputation as a good and honest worker, who drove a friend across town to make a drug drop-off, for which he received five dollars from his friend. He was not a dealer and was not involved in any drug transaction. According to Duster the prosecuting attorney, however, did not express any remorse for this sentence, stating that this would send a message to all who were of the opinion that the drug war was not serious.

retributive viewpoint, it is actually not retribution as such that caused this problem, but another utilitarian perspective, namely the use of punishment to deter, both specifically and generally. Ignoring Beccaria's prescription on penalties that should be at the same time proportional and as lenient as possible, the neo-classical school has again stepped into the trap of using one of the purposive theories of punishment as its main motive.

The return of the classical ideas did not affect all states in the USA equally, and many still retain the principles of determinate sentencing. Rehabilitation is still seen by many as too good an idea to let go off. Proponents of the rehabilitation model are of the opinion that new developments in treatment modalities will show some treatment strategies to be superior in reducing recidivism that the current emphasis on punitive deterrence.

A third development that came to the forefront during the last decade or so, is the idea of restorative justice, where the interests of the victim who – for a long time – has been seen as the “lost child” of the criminal justice process, are emphasized, and where justice is viewed in connection with restoration - both in a social sense, by restoring broken relationships as a result of the crime, and also practical, by means of restitution.

2.4 CONCLUSIONS

Two main conclusions pertaining to the development of correctional ideas may be advanced:

1. The first of these has to do with the inevitability of retribution as the root of justice. The return to the traditional notions of punishment, culpability, and proportion can actually be seen in a deeper sense than a mere pendulum effect, where the mood of the times will determine whether criminal justice is to be based on leniency or punishment. It is the contention of the writer that the failure of rehabilitation can be related to a deeper-lying and growing discontentment with the twentieth century's emphasis on relativism

and humanitarianism in place of common sense notions about right and wrong and the acceptance of certain fundamental truths.

In this regard the positivistic trial with rehabilitation can actually be seen as an interesting experiment in values, where scientists attempted to replace the basic notions of justice, which is that people who wilfully break the law must be held accountable and should be punished, with a more humane alternative: to remove the blame from the individual by ascribing it to antecedental factors and to treat him as an unwitting "hostage to fortune" who must be conditioned into a law-abiding citizen. What is illuminating about the rehabilitation model is not so much the idea of helping people (which is what most members of the public make of it), but rather the methods that were employed to realise this goal. Freeing judges to calculate sentences on an individualised basis, and using indeterminate sentences to ensure that offenders are properly rehabilitated before releasing them, sound like good ideas. Practice has shown, nonetheless, that it could easily lead to the abuse of power since every decision taken on behalf of the individual was done under the guise of rehabilitation, and rested upon the superior knowledge of the treatment agent, against whose decisions criticism was practically impossible. The failure of the rehabilitation motive, then, is not essentially in terms of its failure to reduce recidivism (as it promised to do), but rather in the injustices inherent in this system. Neither is the idea of treating people wrong or unjust, but elevating it to the main motive of punishment will inexorably lead to injustice.

On the other hand, the current emphasis on the deterrent effect of punishment has proved to be just as unfair. Acting under the pretext that "punishment does not work," utilitarians moved to the other extreme and used extreme penalties to satisfy the public and to attempt to deter people from committing crime without considering the notions

of basic fairness towards offenders. In answer to the question, then, why these utilitarian could be considered as wrong, the only plausible answer is that the basic principle of proportion between crime and punishment is lacking in these approaches. Although retribution creates various problems of its own, such as translating “just deserts” and “culpability” into reality, there is a kind of inevitable necessity coupled to it requiring that crimes should be punished according to the wrong that has been done.

2. A second lesson to be learnt from the history of punishment has to do with the continual failure of imprisonment to fulfil the basic requirements of a correctional measure, which is to reduce recidivism and to improve the offender as a person. If a list is made of all the attempts already made to reform prisoners, such as
- isolation,
 - prison labour,
 - strict discipline,
 - deprivation of individuality and inhumane,
- as well as more constructive measures such as
- parole as a means of motivating the offender to work towards his own rehabilitation,
 - training,
 - education,
 - nutritional programs,
 - a huge array of treatment methods and psychotherapeutical techniques, and
 - treating offenders as mental patients,
- all of which did not lead to either reduced recidivism or a real improvement in human conditions, one is left with the sad impression that just about everything had been tried and nothing works.

Another way of looking at this problem is to ask if the measures themselves are at fault or if the problem does not lie with the setting in which they took place, namely the prison. Chapter 3 will discuss this question by looking at the failure of imprisonment.

CHAPTER 3: THE CURRENT CRISIS IN CORRECTIONS: THE FAILURE OF IMPRISONMENT

In chapter 2 it was shown that, in an ideological sense, corrections finds itself in a crisis situation, without indications that any direction shows particular promise. Chapter 3 will look at the situation with regard to imprisonment, emphasising the failure of imprisonment with regard to both its intended consequences as well as with some unintended consequences created as a result of it. In connection with this study, the failure of imprisonment is an important issue, since both the need for probation as well as the extent to which limitations in probation itself should be tolerated, depend on the extent to which imprisonment can be regarded as a failure.

Many countries today experience what can be referred to as an “immediate crisis” in corrections. This crisis refers to the inability of their criminal justice systems to handle the inflow and processing (to put it in economic terms) of criminal offenders, and in a resulting congestion of the criminal justice system in general and correctional facilities in particular.

The crisis in corrections is discussed under the following headings:

1. A brief description of the present situation.
2. An analysis of the external factors that contribute towards the shaping of this crisis.
3. The failure of imprisonment as a sentencing option.

Chapter 4 will deal, in turn, with the evaluation of probation as a possible alternative to imprisonment.

3.1 THE CURRENT CRISIS IN CORRECTIONS

Albrecht (1998) ascribes dramatic increases in the volume of crime internationally mainly to rapid and radical political, social and economic changes that are normally referred to as “transitional processes” or “processes of modernization.” Countries all over the globe, but especially in Eastern Europe, Asia, and Africa, as well as some states in Western Europe and North America, are affected by these changes that often lead to sharp increases in crime. According to Albrecht (1998:54-55), this increase can be explained by changes in the opportunity structures as well as growing lawlessness (which, according to him, is likely to be observed in times of rapid economic and social change).

In terms of this study the most important consequence of the increased volume of crime is the overburdening of the correctional system and its consequences. Regarding the situation worldwide, some examples may be cited:

- In South Africa, Cilliers & Van Zyl Smit (1995:85) mention that overcrowding of prisons “...may well bring the system to the verge of collapse.” The prison population, from January 1995 to January 2002, has grown by more than 52 per cent, whilst prison capacity has only been increased by 10,7 per cent (South Africa, Department of Correctional Services: National Council on Correctional Services 2002), and it is only by making use of bursting and amnesty on a frequent basis that this growth has been kept to manageable levels.
- In England, the prison population first saw a decline from 45 636 in 1990 to 44 566 in 1993, but between then and 1995 there was a sharp rise to 51 047 (Cavadino & Dignan 1997:11).
- Australia has had a growth of 4,1 per cent annually over the seventeen years between 1982 and 1998 (Carcach & Grant 2000:1).

- For some European countries, the rise in prison populations were as follows:
 - In Italy the rates of imprisonment per 100 000 has grown from 45 in 1990 to 60 in 1993 (Ruggiero 1995:46);
 - Messner & Ruggiero (1995:137) mention that from the early 1990's to 1994, the prison population in Germany has risen from 60 to 80 prisoners for every 100 000 of the population;
 - In Spain, prison figures have increased from 10 765 in 1966, to 22 396 in 1985, and to 33 274 in 1991 (Bergalli 1995:156-157).
- The USA situation, which is well-documented, shows 1 933 503 people in jails and prisons in 2000 (Loven 2001). According to Loven, the total corrections population (which includes those on probation and parole) in 2000 stood at 6,47 million - a rise of 49 per cent since 1990.
- Boe, Motiuk & Muirhead (1998) report concerning Canada that, during the five-year period from 1989/90 to 1994/95, the federal penitentiary population grew by 22 per cent.
- Russia, who before 1980 had few conventional prisons and made use of labour camps for 99 per cent of convicted offenders, has a serious problem of providing sufficient and humane prison space for its large numbers of prisoners that is the result of a staggering growth in the crime rate (United States of America. US Library of Congress [2002]). This source also mention that many prisons stopped providing food to prisoners for months at a time, relying on donations from outside sources.
- In Brazil, prison figures that increased from 125 000 in 1995 to 212 000 in December 2000, and which caused some prisons to house three to five times more prisoners than their capacity, led to the country's biggest prison rebellion in February 2001. These gruesome prison riots, involving approximately 28 000 inmates in 28 prisons, led to the death of 19 prisoners (Salla 2001:8).

- The Library of Congress Country Studies: Nigeria [2002] reports that: "...by the late 1980's the overcrowding rate of the prison systems exceeded 200 per cent, with 58 000 inmates housed in facilities designed to accommodate 28 000; in some prisons it was much worse. Although the government announced a prison construction program, little progress was evident and conditions were projected to worsen; by the year 2000, Nigeria's prison population was expected to be almost 700 000."
- For Zaire, the prison population figures are not available. The Library of Congress Country Studies: Zaire [2002] reports though that prison congestion and corruption are widespread, and that reports of prisoners being tortured, deprived of food and water, and dying of starvation are common.

Although all countries normally experience fluctuations in the real growth of its prison populations, it is evident at this stage that - generally spoken - most countries witness a massive growth in prison figures. Although this study will not endeavour an in-depth study of the internal processes at work within prisons that are related to the present crisis, the following consequences of same may be mentioned:

- Understaffing.
- Poor security.
- Bad conditions within prisons (Old prisons, lack of sanitary facilities, lack of opportunities for activities, - leading to low staff morale and unrest).
- Unrest among staff.
- A "toxic mix" of life-sentence prisoners, politically motivated prisoners and mentally disturbed inmates.
- Riots and other breakdowns of control over prisoners (Cavadino & Dignan 1997:10).

In a briefing by the South African Ministry of Correctional Services (South Africa. Department of Correctional Services 1999:2) it was stated that: "... the high density of prisoners in most of our institutions impacts on the behaviour of inmates, it promotes corruption, it has a negative effect on our staff, it hampers the application of rehabilitation and treatment programs, it encourages gangsterism, homosexuality and many other social ills."

In addition, the congestion of correctional facilities often aggravate the problems that are normally associated with prisons, especially those having to do with the negative effects of imprisonment on the individual, such as psychological problems, health risks, the incidence of violence, etc.

What this study does emphasise is the failure of imprisonment as a sentencing option and an evaluation of its wider consequences. It is discussed under two main captions:

1. External factors contributing towards the crisis in corrections, and
2. the failure of imprisonment, at the hand of an evaluation of its advantages and disadvantages as a sentencing option.

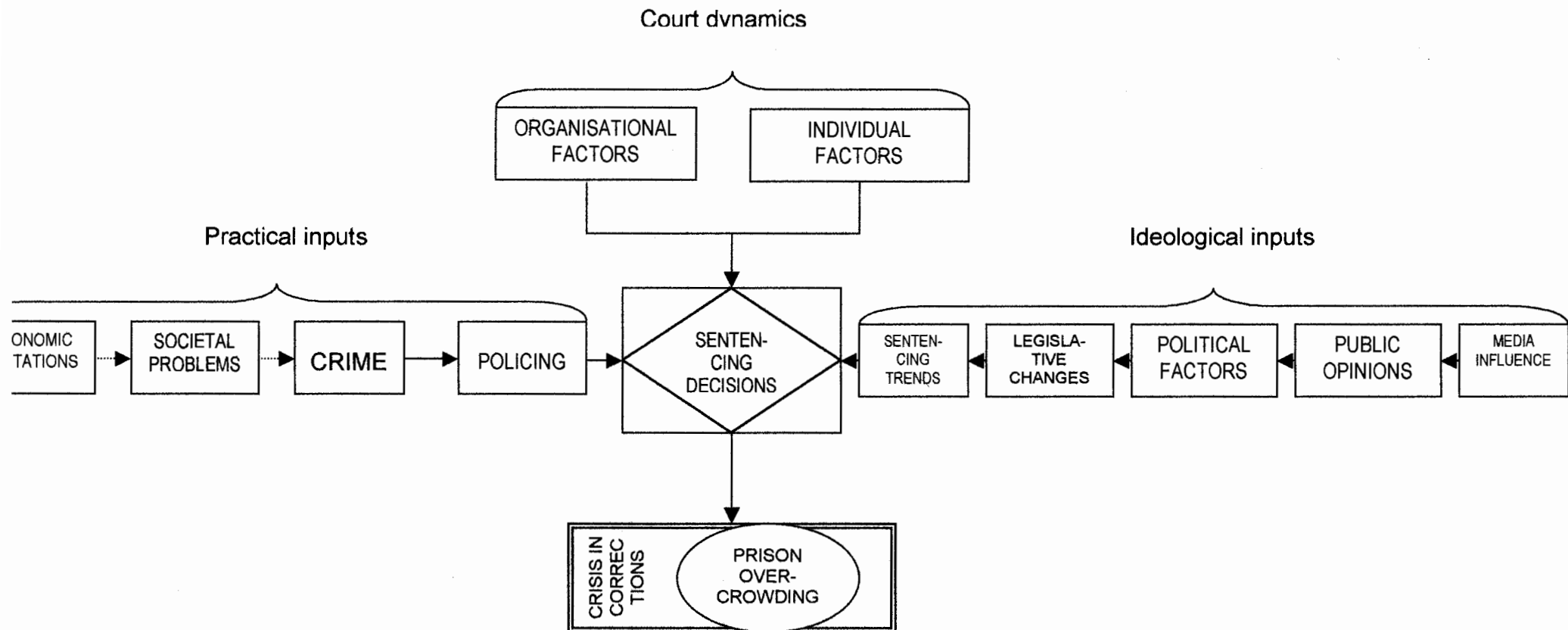
With regard to the crisis in corrections, the external factors that will be discussed here can actually be seen as "driving forces" that exacerbate the situation, and intensify the negative impact of imprisonment on the prisoner, in particular.

High prison populations can not be attributed to increases in volumes of crime alone (although they are an important contributing factor), but also depends on factors such as prevailing punishment philosophies, public opinion, criminal justice practices, and political factors, as well as the interrelationships between these factors. Some of these factors will subsequently be discussed:

3.2 EXTERNAL FACTORS CONTRIBUTING TOWARDS THE CRISIS IN CORRECTIONS

According to Albrecht (1998:53): "The way correctional systems develop and the ways prisoners are treated are dependent on several variables the most important of which are not easily influenced by the prisons and prison administrators themselves because they are located outside the correctional system." It is impossible to properly assess the present crisis in corrections without taking these factors into consideration, because of their role in magnifying the problem. Diagram 3-1 provides a summarised version of the way in which various factors contribute towards the crisis in corrections.

DIAGRAM 3-1 : CAUSES OF THE CRISIS IN CORRECTIONS



Looking at this diagram (which is a gross oversimplification of the processes at work), it is obvious that the crisis in corrections does not occur in isolation, but is the result of various factors that culminate in the sentencing decisions that are taken in court. According to the diagram, sentencing outputs (or the number of convicted offenders that are sent to prison) are determined by:

1. Practical inputs (the number of offenders referred to court for adjudication),
2. certain court dynamics that have an influence on the decisions taken in courts, and
3. ideological inputs (legislation and ideological philosophies that determine sentencing decisions).

As for the practical inputs, societal dysfunctions (according to a number of criminological theories) can be seen as the root cause of crime¹. This, in turn, is often aggravated by economic factors. Crime, as a product of these societal problems (and a variety of other reasons) leads to the social control function of the criminal justice system coming into play (police, courts, and corrections). Important to notice in this regard is that decision-making is not limited to the judicial process alone, but that important decisions regarding the criminal justice process are also taken by the police. Ironically, the effectiveness of the police is also transversely related to the overpopulation in prisons, since improvements in police functioning (related to things such as apprehending and arresting offenders), invariably leads to an aggravation of the situation in prisons. This issue, however, will not be dealt with in more detail.

¹ This, again, is a simplistic representation of the truth, since various other factors can also give rise to crime, as well as a complex set of interactions between such factors and society. The scheme as presented here only attempts to provide structure to the line of reasoning adopted here.

Court dynamics, such as organisational factors and individual factors, also play an important role in the decisions that are made by sentencers. For the sake of brevity, it can just be mentioned that the judicial system, and the way in which courts function, often has its own dynamics, and that - in spite of the fact that the criminal justice system (police, courts, corrections) is typified as a system - these functions often operate very loosely within the larger system, with the result that each organisation often pursues its own aims and goals that do not always take the bigger picture into account. Likewise, individual role players (referring in particular to judicial officers), should also be seen as singular entities, each with his or her own outlook on life and ideas on what the task and function of adjudication and sentencing should be.

Thirdly, ideological inputs are important in shaping the form that sentencing decisions take and its outputs in terms of the number of people sentenced to imprisonment. The contribution of three of these factors (general sentencing trends, public opinions, and political factors) deserve closer inspection.

3.2.1 General sentencing trends

“General sentencing patterns,” as stated in the heading, refer to the effects that different punishment philosophies may have on sentencing. Reid (1981:66) describes it as follows:

“Adoption of a punishment philosophy of retribution or rehabilitation, deterrence or reintegration, incapacitation or reparation, or a combination of these purposes, will affect the nature of sentencing. Sentencing will in turn affect corrections.” Different approaches to sentencing motives do not only affect the number of offenders corrections must handle and

the duration of penalties, but also the forms of punishment that are handed down¹. Whilst individualised sentencing was criticised for leading to arbitrary sentencing decisions, the punitive stance of the neo-utilistic punishment model (particularly with regard to longer prison sentences, the use of mandatory minimum sentences, and the decline in the use of parole), has had a direct bearing on the overpopulation of prisons that is currently experienced.

As for the real effect of sentencing trends, research by Blumstein and Beck (1999) show that 51 per cent of the tripling of the national prison population in the United States from 1980 to 1996 can be ascribed to a greater likelihood of incarceration upon conviction (than in the past) and 37 per cent by longer prison sentences as a result of the “tough on crime” stance that is currently promoted. According to these researchers only 12 per cent of this increase is directly ascribable to changes in crime rates. These figures show the importance of sentencing trends in determining the “output” of courts to prisons.

3.2.2 Public opinions

Public opinions is another important driving force in connection with a tougher approach to crime. Several studies and opinion polls indicate that the public, in most countries, is generally of the opinion that sentences laid down by courts are too lenient (Walker & Hough 1988:6, Corbett 1981:333).

- In the Gallup polls in England (1981) two-thirds of respondents felt that prison sentences prescribed by the courts are, in general, too short. Similar findings were obtained in the United States (FIGGIE 1980), France, and Canada (Walker & Hough 1988:6).

¹ General sentencing trends with regard to the use of community-based penalties in place of imprisonment, for instance, may largely influence the overcrowding in prisons.

- According to data obtained by Stinchcombe *et al.* (1980), in 12 surveys stretching from 1965 to 1978, 49 per cent of Americans in 1965 felt that sentences handed down by courts were not severe enough, which gradually rose to 78 per cent in 1974, and 85 percent in 1978.
- In a study on public punitiveness regarding juvenile offenders in Canada, Baron & Hartnagel (1996) found that 78 per cent of respondents in their sample were of the opinion that youth courts have become too lenient.
- Walker, Hough & Lewis (1988:187) – in their study in England and Wales - have shown that dissatisfaction with sentences laid down by courts differ with respect to the nature of the crime. As for rape sentences, 90 per cent of respondents reckoned that sentences were too lenient. For mugging the figure was 87 per cent and for burglary, 54 per cent.
- In a South African study by Oliver (1999), 84 per cent of respondents in the Northern Province strongly agreed with a statement that sentences handed down by the courts are too lenient.

With regard to opinions regarding imprisonment, Brillon (1988) has found the following:

- That the public sees imprisonment as the ideal method of ensuring public order by playing the double role of deterring offenders and protecting the community (1988:89). Accordingly, approximately 58 per cent of respondents in the sample did not regard it inhuman to keep offenders in prison for twenty-five years.
- That more than two-thirds of respondents were against the improvement of living conditions for prisoners (*Ibid.*, p.90). This can probably be ascribed to 50 per cent of them viewing prisons as "veritable hotels" (*Ibid.*, p.90).

Albrecht (1998:61) remarks that the public in transitional countries support the use of imprisonment much more than do the public in European countries: "Africa has an outstanding position with by far most pronounced preference for imprisonment." This can perhaps partly be ascribed to the fact that underdeveloped countries seldom experiment with alternatives to imprisonment (the functional use of probation has only been seriously introduced South Africa in 1991), and that people therefore associate punishment with imprisonment (Oliver 1999). Ironically, these are the countries that often can least afford this option.

Public insistence that something be done about crime, especially in countries based on democratic principles and with free speech, often lead politicians to espouse and promote a stricter stance towards criminals, especially when this issue show promise in getting them elected or re-elected.

3.2.3 Political factors

In addition to political changes resulting from public pressure, sentencing trends in many developing countries are also shaped by coercion from First World countries, in particular, who insist that individual countries fully integrate their criminal justice systems into international systems (Albrecht 1998:68). This pressure is normally in the form of conditions attached to economic aid to poorer countries. According to Albrecht (1998:68) what is sought after by more dominant countries is that criminal justice systems the world over should be based on uniform criminal legislation and on minimum requirements for sanction systems, which can actually be seen as a "Europeanization" of values and norms. Albrecht cites as examples organisations and treaties such as the European Convention on Human Rights, The Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the European Prison Rules (Ibid., p.68).

Political factors are especially important in the sense that they shape, to a large extent, new legislation that has a direct bearing on the decisions that are taken in court.

3.3 THE FAILURE OF IMPRISONMENT AS A SENTENCING OPTION

As mentioned in the introduction, one of the assumptions of this study is that prison has been a failure in terms of its correctional usefulness. It will be argued here that imprisonment did not only fail in terms of the punishment motives, but that it can also be described as a failure as a result of its unintended consequences - referring to factors stemming from the use of imprisonment as a sentence that often aggravate the crime situation instead of providing a solution.

The goals of imprisonment (against which the failure of imprisonment in its intended consequences must be seen) can basically be equated with the basic motives of punishment, namely retribution, deterrence (both general and specific), protection of the community, and rehabilitation of the offender. The reason for the importance of the sentencing motives in relation to imprisonment is because the decision to lay down imprisonment is usually taken by a sentencing official, who weighs the interests of various parties up against the punishment motives. Furthermore, the whole structure of imprisonment as a sentence is (or is supposed to be) geared towards the fulfilment of these ideas (to deter, to rehabilitative, to incapacitate, and to punish).

As reviewed in chapter 2, the goals of imprisonment are, to a large extent, closely related to the philosophies of the day. The first prisons were based on the principles of penitence, isolation and hard work, which were supposed to change the offender into a law-abiding citizen. From the 1870's, the emphasis fell more on the positivistic contention that the offender should receive treatment, culminating in the pure therapeutic approach of the medical model

in the 1920's, which remained the main motive of punishment until the 1960's. From the middle 1970's the goals of imprisonment shifted towards a more punishment-oriented paradigm, although this approach was not totally carried through. Many countries accordingly still adhere to rehabilitation as the main goal for incarcerating offenders, although practices such as mandatory minimum sentences, longer terms of imprisonment, and limitations on parole are also used extensively.

3.3.1 The failure of imprisonment in terms of its intended consequences

The main fields on which imprisonment can be seen to have failed are as follows:

3.3.1.1 Failure to rehabilitate

As discussed in chapter 2, the rehabilitation model of corrections, that held the sway for more than a century, came under attack during the 1970's, mainly because it was contended that it failed in its mission to reform offenders.

In an interesting article by Kolstad (1996), in which 36 prisoners of the Trondheim prison in Norway were interviewed to determine the reasons why they think imprisonment does not rehabilitate, Kolstad report that, although the offenders generally agreed that their offences are illegal and deserve punishment, they were of the opinion that:

- Imprisonment makes offenders more hostile and critical toward ordinary society,
- two-thirds of the respondents did not believe that prison has any deterrent effect, and
- nine out of ten agreed that prisons are "criminal universities."

Instead of rehabilitation, prisons often tend to aggravate personal problems and have long-lasting psychological effects on individuals (see point 3.3.2.2).

3.3.1.2 Failure to curb recidivism

According to Petersilia (1990a:25), more than 50 per cent of prison inmates in the United States have served a prior prison (or jail) sentence. In a two year follow-up study of a matched sample of offenders in California, the group who have been incarcerated had a 72 per cent rate of recidivism, compared with 63 per cent of those who remained in the community on probation. According to Sparks (2001:28), 55 per cent of adult prisoners and 75 per cent of young prisoners are back before the courts within two years of being released from custody. Cowley (1998:38) remarks that recidivism, although an elusive statistic, is 50 per cent or higher in many states of the USA. In South Africa, the working figure of recidivism is 80 per cent, and can be higher (Cilliers 2002).

In addition, comprehensive research by Martin Wolfgang has shown that each contact with the criminal justice system makes the next time more likely, and each period of imprisonment increases the chances of another incarceration (*quoted in* Schiraldi 1995:4). In other words, imprisonment actually increases rates of re-offending of offenders instead of curbing it.

In Germany, research has shown that youthful offenders sent to prison had higher rates of recidivism than those given alternative sanctions (Pfeiffer 1996:1). Studies conducted by the Criminological Research Institute of Lower Saxony which investigated regional disparities in sentencing and recidivism have found that the number of offenders per 100 000 of the population increased by seven per cent in regions where imprisonment was the norm whilst it decreased by thirteen per cent in those areas that made use of alternative sentencing (in Germany's case suspensions, probation, community service, and a system of day-fines)(*Ibid.*, p.1).

As for the effectiveness of deterrence, findings based on the argument that the effectiveness of individual deterrence can be related to the severity of punishment (in other words that, if

punishments were made more severe, it should deter offenders more effectively from re-offending), have shown that longer prison sentences have little effect on the crime careers of most offenders. Chambliss (1969) found that offenders who are highly committed to a life of crime (who represent a large percentage of the offenders in our prisons) are more difficult to deter than marginal offenders. According to Cavadino & Dignan (1997:34) there are research findings which actually show that offenders who suffer more severe punishment are more – not less – likely to re-offend.

As for the reasons why imprisonment fails to stop offenders from re-offending, Petersilia (1990a:24-25) mentions a number of aspects:

- That possessing a prison record is not as stigmatising as in the past in many poorer communities in the United States, because so many of the offender's peers (and other family members) also have "done time." According to a survey by Beck & Shipley (1989), 40 per cent of youths in state training schools have parents who have been or are incarcerated.
- Petersilia (1990a:25) also remarks that, instead of being stigmatising, ex-convicts in some groups – in criminal gangs, for instance – view detention as something to brag about when they return to the streets.
- For some people who go to prison, the grim fact is that conditions outside the prison are not that different from the conditions inside.

Curtin (2001:871) remarks that evidence shows that many offenders will get into trouble again after release because there is nothing for them to do when they are released. Curtin, who is an American judge, mentions in his article that findings in 1999 have shown that 70 to 80 per cent of released prisoners are still unemployed after one year, 50 per cent are illiterate, and

ten per cent are homeless. A further 20 per cent of released inmates suffer from severe mental illness, that can not be influenced by imprisonment.

It is apparent from these remarks that imprisonment has been a failure in terms of checking recidivism, and that it actually tends to increase such rates.

3.3.1.3 Failure to deter would-be offenders from committing crime

Arguments for using punishment as a way of bringing about general deterrence have also delivered unconvincing results. According to Von Hirsch empirical studies concerning the effect of severity on deterrence have had mixed results, "...with some studies showing that increases in severity have a modest effect, and others showing no effect at all" (1976:40-41). According to the Florida Corrections Commission (2000), literature suggests that – in line with the initial propositions by Beccaria – the celerity of punishment is a more reliable deterrent than its severity.

Referring to Petersilia's remarks above (point 3.3.1.2), the culture in deprived communities may have much to do with this, as incarceration has become part of the culture in these communities and has lost much of its deterrent value (1990a:24-25).

3.3.1.4 Failure to protect the community

Imprisonment implies that offenders, particularly violent ones, are effectively removed from society for a period of time and that the community is protected from their company. It would be a mistake, though, to put too much trust in institutional incapacitation. According to Curtin (2001:871), almost all prisoners, even those with long sentences, are to be released into the community again. In a study by Dinitz and Conrad (1980) of the Academy for Contemporary Problems of Columbus, Ohio, the effectiveness of incapacitation to reduce violent crime was

investigated. In this study 638 violent offences that resulted in arrests by the Columbus police in 1973 were studied. The question posed was: "If at the time of the last felony arrest for any offence previous to the violent arrest of 1973 a five-year sentence had been imposed, how many of the violent crimes of 1973 would have been prevented?" Findings obtained in this study show that a maximum figure of 34 per cent could have been prevented if this had been the case. The costs, though, would have been prohibitive. It was estimated that, for the state of Ohio in 1973, the prison population would have increased from about 9 000 to 33 000. It is obvious that the use of incarceration as a means of protecting the community is of limited use because of the exorbitant costs involved. In England, Sparks (2001:28) also noted that the argument that longer sentences of imprisonment should be utilised to stop offenders from re-offending does not stand up to close scrutiny as the Home Office calculated that a change in sentence lengths of the order of 25 percent would be needed to produce a one percent change in the level of crime, at a cost of 24 000 pounds per prisoner per year.

To conclude, it could be stated that, when one looks at imprisonment from the viewpoint of a modern human rights perspective, it would seem that the rights of prisoners are clearly held in contempt, particularly if one considers that some of the rooted problems of imprisonment (such as homosexuality) are well-known facts. Even at its roots lie some practices, such as explicit threats of force and violations of human rights, which would be unacceptable elsewhere in a liberal democratic state, and which carries characteristics of the police state (Rutherford 1991:2). Instead of seriously considering alternatives to imprisonment, the history of the prison has been characterised instead by a constant process of prison reforms, with which it was hoped to "mend" imprisonment as a sentence. Perhaps the time has come to consider the possibility that imprisonment, due to its very nature, contains some negative elements that will never be totally eradicated.

3.3.2 Failure of imprisonment in terms of its unintended consequences

The second group of problems related to imprisonment has to do with its unintended consequences. This refers to problems that, even though they are not intended as part of punishment, act to aggravate the effects of imprisonment - often to such an extent that the severity of the punishment is totally unrelated to the seriousness of the crime.

3.3.2.1 The impact of incarceration on the families and children of prisoners

Although the purported mission of a prison sentence is to punish offenders and not their families, the opposite is often the case. Studies have shown that the families of prisoners, and their children in particular, are often the biggest losers in the process (Clear 1996:7-8, Buddress 1997). In countries without some kind of a dole system, the situation often is that prisoners are looked after by the state (albeit basically), whilst the families are often left to cope without a breadwinner.

Concerning the children of prisoners, studies by Gabel (1992) and Lowstein (1986) - amongst others - have shown numerous child difficulties as a result of the incarceration of a parent. Wright & Wright (1994) points out that poor school performance, unsupervised free time, financial strain, decreased contact with adults and suppressed anger as a consequence of parental incarceration often act as precursors of delinquency. According to Wright & Seymour (2000:23), imprisonment of a parent can result in behavioural and emotional responses including fear and anxiety, sadness, and physical symptoms including increased health problems and regressive behaviour such as bed-wetting. Lloyd (*cited in* Cunningham 2001:37) also mention that welfare organisations working with prisoners' families claim that there is overwhelming evidence that children, who are already disadvantaged by a variety of factors, suffer discrimination, stigmatisation and further hardship following the imprisonment of a parent.

Reed & Reed (1997:59) and Gabel & Johnston (1995:83) also found that, apart from the trauma that a child experiences because of the incarceration of a parent, the irony of incarcerating parents lie therein that it often increases the probability of the child offending later in life.

3.3.2.2 The destructive and brutalizing effects of imprisonment

Imprisonment can have a brutalizing and destructive effect on the prisoner. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals in the United States (p.313), gave the following compelling reasons for keeping offenders out of long-term institutions:

Prisons tend to dehumanize people... Their weaknesses are made worse and their capacity for responsibility and self-government is eroded by regimentation.... Safety for society may be achieved for a limited time if offenders are kept out of circulation, but no real public protection is provided if confinement serves mainly to prepare men for more, and more skilled, criminality.

3.3.2.3 Destruction of future prospects

Apart from psychological effects that are difficult to quantify, incarceration may also destroy the future prospects of individuals after release. It has been found, for instance, that imprisonment actually diminishes the employment perspectives of ex-convicts (Cowley 1998:38). Freeman (1992), for instance, found large and lasting reductions in the earning potential of ex-prisoners. This may have to do with the social stigma that accompanies imprisonment, where the image of "ex-con" can pursue a person for the rest of his life and where prospective employers are never quite sure whether such a person is to be trusted. In Germany research showed that the removal of youthful offenders from society by means of imprisonment negatively affect their ability to find employment when released (Pfeiffer 1996:1). Pfeiffer also mentions that another long-term study in the 1970's in Germany which

examined the effect of incarceration combined with job training - which was thought to be a promising rehabilitative measure at that time - indicated that, where about 40 per cent were employed before imprisonment, the unemployment rate rose to 60 percent after release, "...in spite of intensive job training and good intentions."

3.3.2.4 Inmate sexual assault and the dangers of HIV infection

Closely related to the previous point of the brutalizing effect of incarceration are the problems relating to sexual assaults.

One of the most serious problems that makes imprisonment an unacceptable sentencing option is the problem of sexual assaults and the health risks posed by it. Dumond (2000:407) remarks that, although the problem of sexual assault is a well-known fact in criminal justice circles as well as in society, very little is being done in prisons to stop or create intervention strategies to address the problem. The problem is partly that inmate sexual assault is inherent in the system of imprisonment, where people of the same sex are locked up together for long periods of time.

As for the incidence of sexual assault, Dumond (2000:408) remarks that, although the actual extent of prison sexual assault is largely unknown (due largely to methodological issues), a recent study by Struckman-Johnson *et al.* (1995) of the Nebraska prison system revealed a 22 per cent rate of forced or coerced sexual assault amongst medium or maximum security prisoners, which may even be underrepresented, as a result of inmate codes and staff attitudes. According to Struckman-Johnson *et al.* (1995) the problem seems to be even worse in larger prisons with more crowding and greater ethnic diversity. According to Dumond (2000:409), prisoners who are most vulnerable include:

- Young, inexperienced prisoners.
- Those who are physically weak or small.

- Inmates suffering from mental illness.
- Middle class offenders who are not "street wise."
- Those who are not gang affiliated.
- Those known to be homosexually oriented.
- Those who are disliked by staff or other inmates.

Among the problems associated with sexual assault are the transmission of HIV and sexually transmitted diseases, medical injuries, post-traumatic stress disorder, depression, suicidal ideation, etc. It may also have severe long-term psychological consequences for both the victim and the perpetrator.

3.3.2.5 The uneven application of imprisonment on the poor and disadvantaged

Much have been written about the uneven descent of the criminal justice system upon the poor and marginalized segments of society.

Referring to the Australia situation (as an example), Norden (1999:15) remarks that prison expansion is predominantly taking place in those states with a greater proportion of aborigines and Torres Strait Islanders¹. These groups are imprisoned at 50 times the rate of Australians in general. United States Secretary of State Colin Powell (*quoted in* Curtin 2001:872) also referred to the slum neighbourhoods, where predominantly Black people and urban poor reside, as: "...the training camps for America's prisons."

Critical criminologists, in particular, charge that the disproportionate attention given to these segments of the population is not so much because they are more criminally inclined, but because they are more vulnerable and easier to target (Norden 1999:15). The question is also

¹ Aboriginal people living on the islands that run down Australia's eastern coast.

asked how a criminal justice system could be considered just when there are blatant injustices inherent in community structures as such.

3.4 CONCLUSIONS

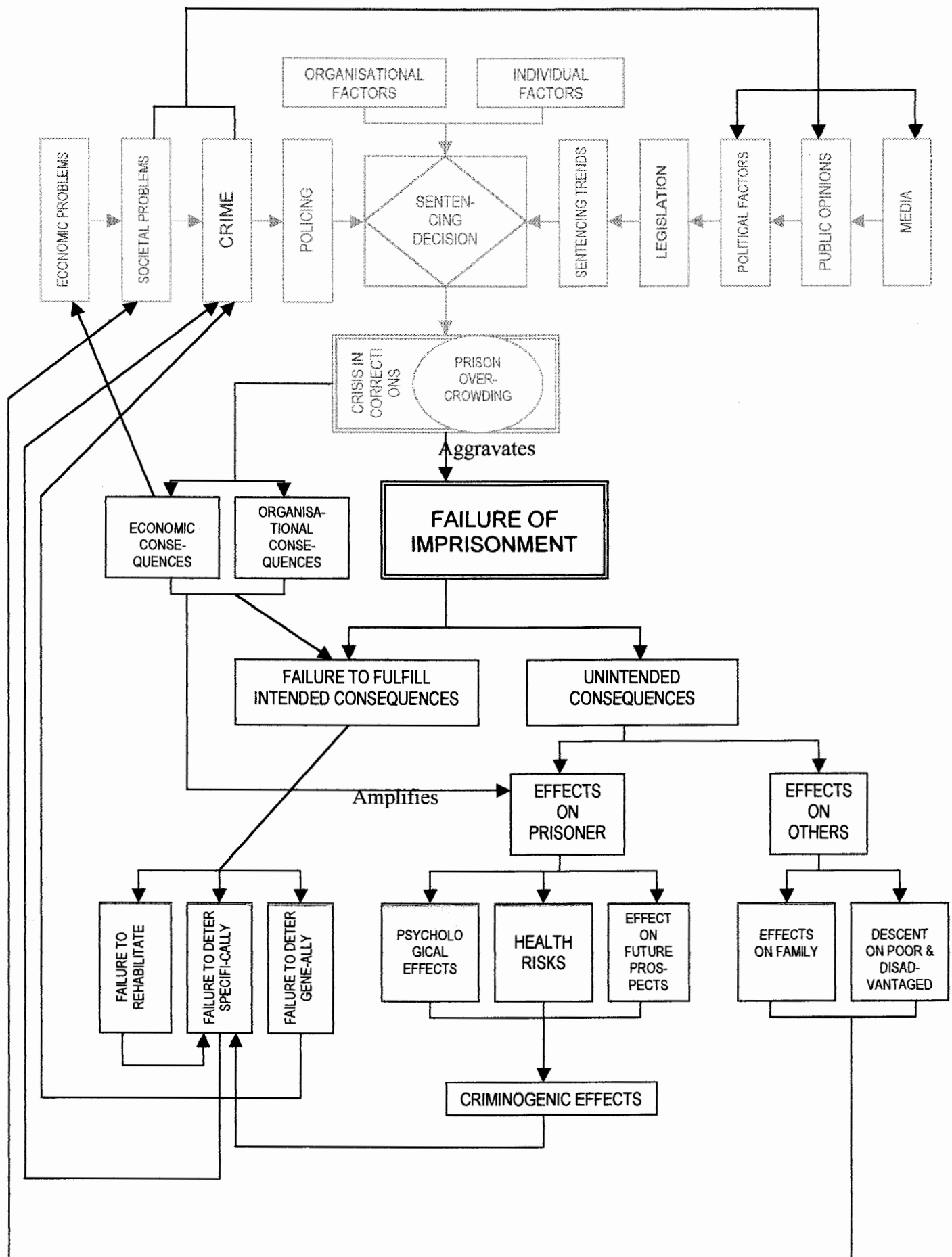
Concerning the first part of this chapter, that is the external factors that influence the shaping of corrections, three factors were mentioned that deserve special attention:

1. Sentencing trends,
2. public opinions, and
3. political factors.

In terms of this study, these aspects' importance does not only lie in their influence on imprisonment alone, but more in the fact that any changes in correctional systems would have to take notice of its repercussions concerning these factors.

With regard to the perceived failure of imprisonment discussed under point 3.3, the following diagram can be drawn:

DIAGRAM 3-2: CONSEQUENCES OF FAILURE OF IMPRISONMENT



Factors discussed in diagram 3-1 are dimmed since they were already discussed. The reason for their inclusion is to show the relationship

Apart from categorising the effects of the failure to fulfil its basic mission and as to its unintended results, respectively, diagram 3-2 also show of the relationships between the factors:

Firstly, it can be seen that the unintended consequences can have consequences for two groups: the offender and other parties. The importance of its effects on the offender is that it can in all instances be criminogenic, which contributes towards the failure of this sentence to deter prisoners from re-offending. As for its effects on the family of the prisoner and its uneven descent on the poor, these factors can be seen to aggravate social problems, which can in turn also be criminogenic, as described previously.

As for its failure to fulfil its intended consequences, imprisonment can basically be seen as failing in its tasks to: a) Rehabilitate, b) deter specifically, and c) deter generally. As shown in the diagram, there is a direct relationship between its failure to rehabilitate and to deter. The failure in both its tasks of deterring specifically and generally can again be seen to have a direct effect on crime rates (which creates a circle effect in that offenders re-enter the criminal justice system).

Other aspects bearing a relation to its failure to fulfil its tasks are the direct results of the overloading of prison facilities, which creates economic and managerial problems, which tends, in turn, to diminish the capacity of imprisonment to perform its tasks properly. As a result of adverse conditions inside overcrowded prisons, effects on the prisoner are also aggravated which can lead to an even bigger criminogenic effect. As mentioned in the introduction to this chapter, overcrowded prisons also have economic consequences that have a direct bearing on the general economic situation in a country.

This diagram also show the circle effect of the failure of imprisonment, in that crime, as well as perceptions of crime and societal problems, tend to influence public opinion, which leads to public insistence that sentences be made harder, etc.

If these negative consequences are taken into consideration, the critical issue can be described as follows: **A person commits a crime for which he deserves to be punished. Apart from the time served in prison, however, this type of punishment often has other wide-ranging effects that can far outweigh the severity of the punishment itself, which makes the sentence unjust.** This can again be related to the notion of retribution, where some kind of fairness-principle (proportionality of punishment to crime) needs to be built into a system, instead of only looking to see whether it works or not.

Another way of stating the problem is that an ethical dilemma is created when people, even if they are prisoners, are wilfully placed in dangerous situations, especially as one of the explicit functions of the state is to protect its citizens. Whichever way one looks at it, there is clearly an unethical element involved in sending a person to prison if it is a known fact that he will have, say, a 50 per cent chance of getting infected with HIV¹. From a just deserts perspective, it can even be asked if anyone deserves to be placed in such situations at all.

If seen in terms of its failure as sentence, the unintended consequences created by its use, and the crisis situation in corrections that tend to aggravate the situation, the necessity for a feasible alternative or alternatives to incarceration require urgent attention. Chapter 4 will investigate probation, and in particular the use of Intensive Supervision Probation, in this regard.

¹ On the 10:00 news bulletin of 5 June 2001 (Radio South Africa), it was reported that the Minister of Correctional Services stated that up to 60 per cent of prisoners in South Africa could be infected with HIV, but that further research is needed to clarify this issue.

CHAPTER 4: PROBATION

Chapters 2 and 3 have shown the crisis in corrections in terms of the ideological and the practical situations respectively. Chapter 4 will take a critical look at probation, evaluating it in terms of its perceived advantages and limitations, and also as a sentencing alternative to imprisonment. Chapter 5 also deals with probation, but then with regard to some of the main ideologies surrounding corrections at the moment.

One reason for rethinking probation and its role as a sentencing option is that probation, according to John Augustus' model, was originally conceived and structured for offenders who pose little threat to the society (Lawrence 1991:455). If probation is to be considered as a practicable alternative to incarceration, it would mean that offenders that are normally sent to prison should be considered for handling in the community. To a large extent, the whole debate surrounding probation at the moment has to do with this aspect, as the use of probation for more serious offenders poses some unique challenges. The issues of community safety and the control of offenders, together with an attempt to prevent recidivism, have therefore received much more attention in recent times.

The following aspects will be dealt with in this chapter:

1. A description of probation.
2. Probation as a sentencing option.
3. Intensive Supervision Probation (ISP).
4. Issues on ISP.

4.1 DESCRIPTION

Because this study focuses on probation, a more complete description (than with imprisonment) is required.

4.1.1 What is probation?

The American Correctional Association (1975:7) provides the following definition of probation: “[I]t is a judicial disposition (sentencing alternative) that establishes the defendant’s legal status under which his freedom in the community is continued subject to the supervision by a probation organisation and subject to conditions imposed by the court.” This definition distinguishes four characteristics of probation:

1. That it is a sentence which is laid down by the courts.
2. That it is served in the community.
3. That, although the offender stays in the community, his or her freedom is dependent on certain conditions.
4. That the offender is supervised by a person or organisation that acts as a representative of the court.

A second characteristic of probation is that, although it is an independent sentence, it can also be seen as a type of a conditional suspended sentence¹. This meaning of probation is captured in the word itself, where the term probation is derived from the Latin “probare,” which means to test or to prove. The idea is that a sentence of incarceration is deferred, and that the

¹ To confuse matters even more, probation can be laid down as a condition for a suspended sentence itself (see point 4.2.1). In this case a revocation would mean that the term of imprisonment initially laid down by the court would normally be activated.

offender has to prove that he or she is able to remain crime-free in the community for a certain period of time. Imprisonment represents the “sword” hanging over a person’s head, which aims at deterring the offender from further crime.

A third characteristic of probation lies in its flexible nature. In this sense, no clear-cut distinctions between probation and other community-based sanctions can be drawn, as probation acts more as a condition for the application of community-based sanctions than as a sanction in itself. Almost any community-based measure can therefore be included in a sentence of probation, which makes it largely adaptable to the punishment motives and the needs of the offender.

A fourth characteristic of probation, which is closely related to the previous point, is that there are often large differences between the program contents of different states (referring to the United States), different countries, and even different offices. Factors that may differ between different can include differences in the intensity of supervision, types and style of supervision, conditions, and revocation procedures, to mention some. This makes a precise definition of probation difficult, and also leads to problems when assessing the comparative effectiveness of programs.

4.1.2 Origin

The origin of probation is usually ascribed to a well-to-do shoemaker, John Augustus, who attended court cases in the 1840's and assisted petty offenders out of personal benevolence. Augustus lent a hand to many unfortunate people, who would normally have been sent to prison, paying their bail and caring for them in his own home. Afterwards he would report to the judge on their progress. Augustus reported one of the cases that occurred in August of 1841 in his own words (cited in Bartollas & Conrad 1992:):

I was in court one morning, when the door communicating with the lock-room was opened and an officer entered, followed by a ragged and wretched looking man who took his seat upon the bench allotted to prisoners. I imagined from the man's appearance, that his offence was that of yielding to his appetite for intoxicating drinks, and in a few moments I found that my suspicions were correct, for the clerk read the complaint, in which the man was charged with being a common drunkard. The case was clearly made out, but before sentence had been passed, I conversed with him for a few moments, and found that he was not yet past all hope for reformation...He told me that if he could be saved from the House of Corrections, he never again would taste intoxicating liquors, there was such an earnestness in that tone, and a look of firm resolve, that I determined to aid him, I bailed him, by permission of the Court. He was ordered to appear for sentence in three weeks from that time. He signed the pledge and became a sober man; at the expiration of this period of probation, I accompanied him into the court room...The Judge expressed himself much pleased with the account we gave of the man, and instead of the usual penalty - imprisonment in the House of Corrections, he fined him one cent and costs amounting in all to \$3.76, which was immediately paid, and without doubt has been by his treatment, saved from a drunkard's grave.

In this manner Augustus assisted over two thousand people, of whom - according to reports - only a few returned as failures. After Augustus, the practice of volunteers working with courts to assist minor offenders continued until the state of Massachusetts authorised the first probation statute in 1878. In 1900 six states in the USA provided for probation. By 1920, all states made provision for juvenile probation, and thirty-three states also used adult probation. Today, in the United States, more than twice as many people are placed on probation as are sent to prisons and jails (Bartollas & Conrad 1992).

4.2 THEORETICAL UNDERPINNINGS: THE REINTEGRATION MODEL

Although there are different approaches to probation nowadays (see chapter 5 for a discussion of four different models of probation), probation is essentially based on the idea of helping offenders to become law-abiding citizens by providing them with opportunities and teaching them how to use these opportunities. This is known as the reintegration model.

To understand this term better it is necessary to see where it comes from. In sociology there is a concept "integration" that is described as "the extent to which members of a group work together in the attainment of a common goal." (Johnson 1971:54-56). If integration is seen as the extent to which people work together, re-integration - on the other hand - would mean that those individuals who do not give their co-operation (people who are not efficiently integrated) must be taught how to re-integrate successfully.

According to Carney (1980:95), elements of the "anomie-theory" can also be detected in the reintegration model. Durkheim (*quoted in* Carney 1980:95) described anomie as: "Insufficient normative regulation of individual's activities, with the result that they do not feel attached to the collectivity." According to Durkheim, historical developments such as urbanisation, industrialisation and work specialisation were all factors that limited the traditional roles of the family and religion in integrating an individual successfully into the community (Turner & Beeghley 1981:244). The result of this lack of proper integration is that some people feel estranged from the common values of the community, and may then turn to alternative modes of behaviour because they feel rejected by society (*Ibid.*, p.343).

If the anomie-theory is placed into the context of the reintegration model it would mean that, if we want to address the problem of crime in a meaningful way, ways would have to be devised to reintegrate anomic (or lawless) people effectively into society. According to Carney the reintegration model is based on the belief that, if individuals were free to take part in the basic social institutions successfully, they would feel satisfied and will be disposed towards conformity (1980:85). Conformity in this sense refers to "law-abiding citizenship," and the purpose of community-based corrections is then to influence deviant individuals to take on the role of law-abiding citizens.

4.2.1 Rationale

The “American President's Commission on Law Enforcement and Administration” (1967, *quoted in* Bartollas 1985:11) described the role of community corrections as follows:

The task of [community] corrections therefore includes building or rebuilding solid ties between offender and community, integrating or reintegration the offender into community life - restoring family ties, obtaining employment and education, securing in the larger sense a place for the offender in the routine functioning of society. This requires not only efforts directed toward changing the individual offender, which has been almost the exclusive focus of rehabilitation, but also mobilisation and change of the community and its institutions.

From this can be concluded that the focus of the reintegration model has to do with the community and the offender. It relies on the following assumptions regarding these two role players:

4.2.1.1 The community

According to Bartollas the reintegration model assumes that offenders' problems must be solved in the community where they began. McCarthy & McCarthy implies, for instance, that some communities deprive their members of contact with institutions that are basically responsible for the development of law-abiding contact: sound family life, good schools, employment, recreational opportunities, etc (1991:2). It is accordingly felt that society has a responsibility for its own problems and that it can partly fulfil this responsibility by helping law-violators to integrate themselves back into the social order (Bartollas 1985:27). The way in which this is to be attained lies in the provision of opportunities whereby offenders would be enabled to develop law-abiding behaviour.

4.2.1.2 The offender

According to Bartollas (1985:27) the most important requirement for the success of the reintegration model is that offenders must be taught how to make use of these opportunities.

The process whereby offenders learn how to reintegrate successfully is known as "internalisation." To bring about internalisation, offenders must be introduced to options such as job training, job creation, recreation and any other practical alternatives to crime (Bartollas 1985:28). The idea with this is that internalisation should eventually lead to conformity with a law-abiding mode of life.

Reintegration philosophy has encountered increased criticism in recent years, though. Critics charge that this high-sounding concept lacks meaning in the real world. These commendable sentiments, they explain, are extraordinarily unrealistic in a world in which narcotics, the underclass community, racism, and lack of opportunities define resocialization for adult offenders (Bartollas & Conrad 1992:197).

4.3 PROBATION AS A SENTENCING OPTION

4.3.1 The court use of probation

Apart from the flexibility of probation with regard to its contents, probation is also exceptionally adaptable in terms of its use by the courts. Although its application is usually prescribed by legislation, it can potentially be used for a variety of reasons:

1. As a direct sentence (in the place of imprisonment);
2. as part of a split sentence (also known as "shock incarceration");
3. as a condition of a suspended sentence;

4. as condition of a deferred sentence (as a type of diversionary measure);
5. as an alternative to pre-trial incarceration;
6. as a release mechanism from prison (also known as its "back-end" use); and
7. to replace imprisonment for offenders who are not able to pay fines.

Apart from these uses, probation can practically be employed in any instance where the court wants to keep some kind of control over an offender when it does not want to expose him or her to imprisonment.

4.3.2 The sentencing decision

For a sentence of probation to be set into motion, the sentencing official would normally request a presentence report from the probation office. This report is based on a presentence investigation. The purpose of this report is to provide the sentencing official with the basic facts relating to the life history of the offender and his present environment, and essentially deals with the question of whether this type of sentence will be suitable to the specific offender. Judicial officers normally rely heavily on the recommendations contained in these reports when deciding on the conditions and duration of the sentence.

The choice to lay down probation as a sentence is mostly taken by the sentencing official, although - in some isolated cases - probation for certain offences may be determined by law or prescribed as part of a sentencing guidelines system. Although the magistrate or judge normally has the prerogative of laying down probation at his or her discretion, certain categories of offenders (such as rapists, violent offenders, murderers, etc.) may sometimes be excluded by legislative provision. Apart from any legal restrictions placed upon the sentencer, the factors that are normally taken into consideration when considering a sentencing of probation include:

4.3.2.1 The type of crime

Although some justice systems prohibit certain types of offenders from being considered for probation, it can theoretically be applied to any type of crime. According to Krügel & Terblanche (referring to the South African situation) the type of crime is not the decisive factor when correctional supervision is to be decided on; the offender and his circumstances are of more importance: "He must be a person who is in need of supervision and can profit from it." (1991:1007). Notwithstanding this provision, probation is normally reserved for and considered as suitable for less serious offenders.

4.3.2.2 The suitability of probation as sentence

Probation can be a suitable form of sentence for those types of offences that lend themselves to treatment or supervision, such as drug or alcohol abuse, the non-payment of maintenance and psychological treatment. Sentencing officials may also consider probation for humanitarian reasons, such as when an offender is a single mother or when she requires medical help.

4.3.2.3 The type of offender

Although not limited to first-time offenders and juveniles, it is considered more suitable for such groups because it is supposedly easier to exert a positive influence on them. Older people and repeat offenders are usually more resistant to intervention.

4.3.2.4 The safety of the community

The safety of the community is a vital factor when a sentence of probation is considered. Even though strict surveillance of probationers may decrease opportunities to commit further crimes, this can not be guaranteed to the same extent as with imprisonment.

4.3.2.5 Employment and a fixed address

For practical reasons candidates are normally required to have a fixed address (so that they can be monitored) and should ideally be employed. In countries such as South Africa this presents a real problem as a large segment of the population are chronically unemployed due to a scarcity of work.

4.3.2.6 The Availability of Community Resources

Because probation constitutes a community-based disposition, the judge must also consider the availability of community sources before laying down the conditions that the offender will be answerable to. It is pointless, for example, to stipulate that the offender must do community service somewhere if such a place is not willing to let him work there.

4.3.2.7 The Willingness of the Offender

A last important consideration that is easily overlooked is the willingness of the offender to participate in such a program. If a person is negative towards the sentence from the outset, its chances of being successful are slim.

4.3.3 Intensity of application

It is important to distinguish between so-called "routine probation" and "intermediate sanctions," which refers to a much more stringent measure in terms of supervision and conditions.

4.3.3.1 The routine application of probation

Routine probation, as applied in the United States and other European countries, usually involves the release of an offender into the care of a probation officer (traditionally someone

with some social work education), who acts as his or her counsellor or advocate¹. Although such a sentence is normally conditional², the conditions usually do not involve more than that the offender should lead a law-abiding life, maintain his or her employment or pursue educational training (in the cases of pupils or students), meet family responsibilities, undergo some kind of treatment (if needed), or receive medical and psychiatric attention. Other prescriptions that are normally included are that the probationer must obtain permission before leaving the jurisdiction, and that he or she should not associate with criminal elements. Supervision is usually minimal, and the probation officer often only becomes really involved with his or her clients when they experience some kind of problem.

A second characteristic of routine probation is its adherence to the principles of the rehabilitation model. According to Lurigio & Petersilia (1992:7):

Most probation staff at that time [referring to the situation before the 1970's] supported the medical model, which assumed that offenders were sick, disadvantaged, or otherwise needy. The probation officer's task was to diagnose the trouble and provide appropriate treatment (either directly or by referral to another agency). In this context, the officer was seen as the probationer's advocate or counsellor. The obligation to enforce court-ordered conditions was acknowledged, but aspects of control, monitoring, and surveillance remained secondary.

Unfortunately, especially in the United States, severe crowding with regard to probation is often the case and, as a result, meaningful intervention on an individualised basis is almost impossible to accomplish. Rosenfeld & Kempf (1991:488) account that in Los Angeles, half of

¹ The idea of "advocacy" refers to the notion that a probationer needs someone to act as advocate or mediator in his or her stead. Such a person had to stand in on his or her behalf in the community - fighting his or her case and helping him or her to secure a place in society.

² A sentence of unsupervised probation is also used, which is in principle similar to the unconditional suspended sentence as used in our country. This sentence merely require of the offender to remain crime free for a certain period of time in lieu of a prison sentence.

the probation population is supervised by probation officers with caseloads of a thousand or more offenders and, in San Diego County, rates are as high as 700 cases per officer. Joseph Conrad (1985:412) describes the problem of probation overloading as follows: "Understaffed probation departments cannot possibly carry out the role and intention of John Augustus, the admirable father of probation, who saw that friendly understanding could change the course of an offender's life...[and]...there are too many probation departments in which officers cannot even find time to see probationers during the prescribed period of supervision." The role of rehabilitation in ordinary probation can therefore largely be seen as an attempt to pacify the court and the public that something is being done about the offender.

Concerning the types of offences for which offenders receive probation, Loven (2001) mentions that approximately 52 per cent of those on probation in the United States were convicted of felonies, of which most were cases of driving under the influence, followed by drug offenders.

Routine probation can consequently be described as a relatively light sanction which is mainly aimed to sentence first offenders or offenders who do not hold a danger for society. Although it is based on the rehabilitation model, little to this effect is normally concluded, which is mainly ascribable to the overloading of probation officers, who are forced to react to problems rather than being in the position to act proactively.

4.3.3.2 Intensive Supervision Probation (ISP)

In the early 1980's, with the advent of the corrections crisis in the United States, it was realised that the modern penal system has too few available sentencing options. According to Petersilia, Lurigio and Byrne (1992:ix) the problem was that available options were either too lenient (referring to probation and fines) or too harsh (imprisonment). Considering realistic alternatives to imprisonment, it was realized that it is important to weigh individual measures

in terms of their relative severity, because it is necessary to convince the public and the judiciary that justice is being done. In search for solutions, many states began to experiment with “intermediate sanctions” - penalties that lie somewhere between prison and ordinary probation in terms of severity (Petersilia *et al.* 1992:ix). The most important of these sanctions, that can potentially include all of the other as conditions, is Intensive Supervision Probation (or ISP). According to Lurigio & Petersilia (1992:6), IPS in practice means that “...offenders [typically] have multiple weekly contacts with their probation officers. They are also held stringently to curfews and other conditions of release, are subjected to unscheduled drug tests, and are ordered to perform community service.”

Most ISP programs in the United States (including the South African model) are based on the Georgia system. ISP in Georgia began in July 1982 where it was implemented as the result of a finding that, in 1981, more than 3000 first-time offenders with non-violent offences were sent to prison (Conrad 1985:413). Even though these men and women did not pose a real threat to society, their crimes were considered to be serious enough to warrant a prison sentence. Because it was realised that something was needed that could replace imprisonment in such cases, and that routine probation was generally seen as too soft an option, ISP was devised to provide a rigorous and intrusive intervention in the lives of these offenders.

Although huge variations in the application of ISP makes generalisation difficult, these programs usually include much more stringent measures in terms of supervision and conditions than routine probation and can consist of multiple weekly contacts between the probation officer and the client, curfews, house arrest, unscheduled drug tests, and community service. ISP will subsequently be discussed in more detail under point 4.3.

In conclusion it must be mentioned that, although ISP purports to be a much more serious infringement upon the freedom of the individual, this does not mean that routine probation can be clearly distinguished from ISP:

1. Not all ISP is as stringent as the Georgia model mentioned above, and in many cases shortages of resources can result therein that the conditions and supervision are not always enforced as planned. The result is that ISP programs are then almost indistinguishable from ordinary probation.
2. Ordinary probation has also been influenced by the shift towards a tougher approach and more stringent control of probationers. In a report to the United States Department of Justice concerning the characteristics of adults on probation in 1995, Bonczar (1997) reports that, with reference to all probationers under state and local probation agencies (including those under ISP), 99 per cent were given special conditions, with 82 per cent having three or more conditions on sentence. According to Bonczar, the percentages of probationers with special conditions in 1995 were as follows:

TABLE 4-1: PROBATIONERS WITH SPECIAL CONDITIONS IN THE UNITED STATES,

1995

Special condition:	Percent
Fees/fines/costs	84,3%
Drug testing	32,5%
Drug/alcohol treatment	41,0%
Community service	25,7%
Restitution	30,3%
House confinement	10,1%

If these numbers are compared to that of conditions for ISP programs in 31 states (table 4-2), it can be seen that ordinary probation is fast becoming more stringent in a ubiquitous sense

when compared to the traditional application of routine probation (point 4.2.2.1), and that a clear-cut distinction between these two types of probation is not obvious.

Having provided a broad overview of probation as a sentence, ISP programs will now be discussed in more detail.

4.4 INTENSIVE SUPERVISION PROBATION

Intensive Supervision Probation (ISP, or IPS - for "Intensive Probation Supervision" as it is also referred to), although distinguishable from ordinary probation should however not be seen as a distinct sentencing type, but only as a more intense form of ordinary probation.

4.4.1 The need for ISP

As mentioned in point 4.2.2.2, ISP developed out of a situation in corrections where there were particular needs for a specific type of sanction. Tonry & Will (1988:6-10) mention the needs of the time that necessitated a movement in this direction:

1. The need for alternatives.
2. The need for just deserts.
3. The need for fairness and equity.
4. The need for intermediate punishments.
5. The need to distinguish general and specific sentencing aims.

During a time in American penal history when the pendulum had swung from the ideals of rehabilitation to a requirement that the community be protected against criminals, Intensive Supervision Probation promised to:

- Relieve prison crowding.

- Present a cost-effective alternative to incarceration.
- Convince the public and the courts that the offender receives his just deserts.
- Offer a safe alternative for high-risk probationers.

For the offender, the perceived advantages are that it:

- prevents subjecting the offender to the negative prison milieu that could lead to bitterness, deviant behaviour and contamination by hardened criminals. ISP consequently offers a better chance of successful adaptation in society after exiting the system, than confinement,
- keeps the offender in the community where he or she is able to live a normal life, and
- enables the offender to retain his or her job (Sparks 2001:28, Norden 1999:15), which implies that offenders are able to fulfil their obligations towards their families and to the community, and that a criminal sentence does not lead to financial hardship for the offender's family (Sparks 2001:28).

Since ISP seemed to offer "something for everyone" (Petersilia 1987), it enjoyed wide support from court officials, scholars, and the public, which led to its universal application in all the states of the USA.

4.4.2 Description of ISP systems

As the original Georgia model is the most replicated model of ISP, it may be a good idea to firstly take a look at the way in which it is applied. According to Conrad (1985:414), the initial ISP system in Georgia contained the following elements:

1. Five face-to-face contacts with the UPS team every week, on in the office, one on the job, three at home, including one on the week-end;
2. weekly verification of employment;

3. Nightly curfew, ordinarily at 8:00 p.m. unless the probationer has a job with hours that conflict with this limit;
4. Coordinated record check with local law enforcement every week;
5. State-wide tracking through the law enforcement computer network - any police contact anywhere in Georgia will be immediately brought to the attention of the IPS team;
6. A minimum of 8 hours per week of unpaid community service for probationers in regular employment. Unemployed probationers are required to put in as much as 40 hours a week, depending on the status of their search for a job.

It is obvious from these stipulations that this program consists of extensive and ubiquitous supervision. The conditions adhered to this program are also quite strict, demanding as much as 40 hours community service per week from unemployed probationers. Another conclusion that can be drawn about the Georgia ISP is that it is based on a pure control model, which attempts to exert as much control as possible on the movements and time of the offender. Not all ISP programs are this intensive, though. ISP's differ not only with regard to their contents, but can also be different depending on the model of control that it adopts. Byrne, Lurigio and Baird (1989:14) mention, for instance, that justice models, limited-risk models, or treatment oriented models all differ with regard to the amount of control they exert on probationers.

Another example of an ISP program is the Des Moines Drug ISP where a strong emphasis is placed on urinalysis testing and unannounced visits. This program also employs drug and alcohol treatment, and employment development (Petersilia, Turner & Deschenes 1992:23). In this ISP program surveillance officers are on standby during all hours of the day and night as well as on weekends. The system is based on the principle of rewarding successes and delivering speedy sanctions for failures. An offender moves through two phases. After an offender graduates from phase one to phase two, for example, she receives a letter of congratulations outlining the accomplishments achieved during the first phase and defining new goals to be reached in phase two. The complete programme is designed to last between six and twelve months. In phase one (the first three months), offenders receive 16 face-to-face and four telephonic contacts per month, as well as eight drug tests. Furthermore, they

have to observe night-time curfews, and must show verification of employment or attempts at obtaining employment. The second (or control) phase consists of two face-to-face and to collateral contacts per month, and one home visit (*Ibid.*, p. 23).

As for specific procedural aspects, the following variations between states (in the USA) in terms of ISP can be pointed out:

4.4.2.1 Target populations for ISP

Byrne *et al.* (1989:12) mention that there is wide discrepancies with regard to the type of offenders that are considered for possible placement into ISP programs. In the 31 states investigated by them, 8 out of 10 programs targeted non-violent offenders, in 5 out of 10 cases violent offenders are admitted, drug offenders are considered in 6 out of 10 programs, and probation and parole violators are admitted in 4 out of 10 programs.

A frequent concern regarding ISP intakes are the high number of low-risk offenders that are included in these programs. The question can be asked whether offenders who normally would have been handled effectively under normal probation warrant the use of intensive control.

4.4.2.2 The intensity of supervision

Supervision in ISP can take place in a number of ways:

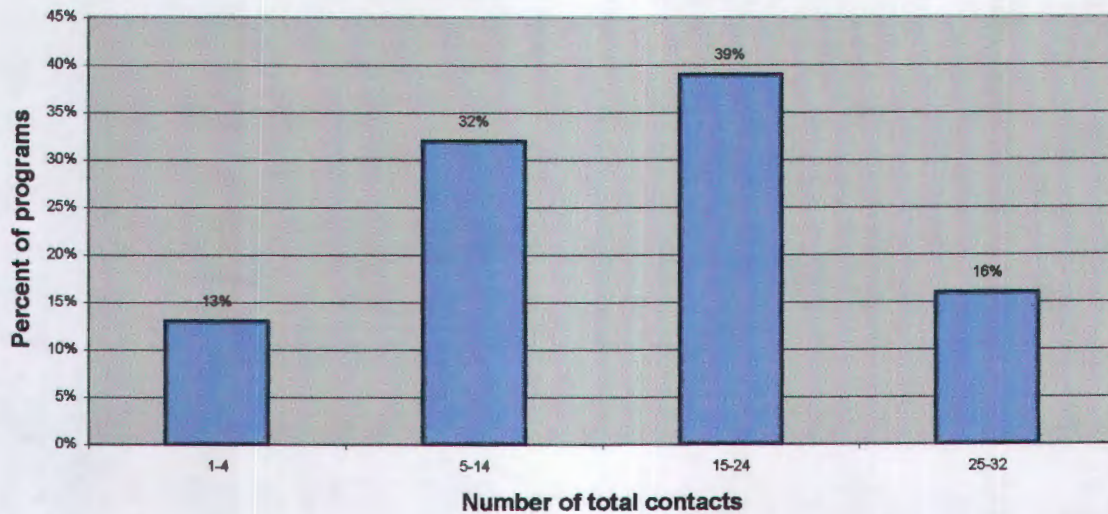
- The first is physical visits to the residence or workplace of the probationer by the controlling officer at irregular times.
- The client can also be ordered to present him or herself to a probation office or to submit a written report on a regular basis.

- Telephone calls may also be used to ensure that the probationer is at home or work during different times of the day or night.
- Recent developments on the field of electronic circuitry make it possible to monitor offenders by means of "electronic monitoring."
- In some ISP programs the residence of the probationer can be searched for stolen goods or drugs.
- Urine tests and affordable drug tests, as well as inspection of the skin to look for drug injections, can be conducted on a regular basis.

Petersilia (1990:25) gives the following description of what ISP supervision in Marion County, Oregon entails: "The offender will serve a year under this sanction. During that time, the offender will be visited by a probation officer two or three times per week, who will phone on the other days. The offender will be subject to unannounced searches of his home for drugs and have his urine tested regularly for alcohol and drugs. ..."

Byrne (1986:12-14) compiled the following comparison of monthly contacts for 31 states with IPS programs:

CHART 4-1: SUPERVISION CONTACTS IN 31 STATES



It is clear from this table that ISP's differ considerably in their ideas about strict supervision, which is again indicative of the non-specific nature of ISP and also of the diverse ideological underpinnings of individual programs.

4.4.2.3 Conditions

Apart from "avoidance" conditions (conditions that require the offender to refrain from certain unwished-for activities), some of the conditions that can be included in ISP are:

- House arrest (with or without electronic monitoring).
- Drug and alcohol monitoring.
- Community service.
- Compulsory attendance of treatment programs.
- Probation fees.
- Restitution.

4.4.2.3.1 House arrest and electronic monitoring

Home arrest consists of the court ordering an offender to remain at home whenever he is not at work or engaged in some other activity that is allowed by the court. The rationale behind home confinement is that his or her home serves as a "prison," which means that the offender is not permitted to leave the boundaries of his residence during certain hours of the day or night.

Apart from physical visits by the probation officer, the new trend in enforcing home confinement is electronic monitoring. Electronic monitoring comprises of a body-worn pulsing transmitter that is placed around the wrist or ankle of the probationer. This anklet or wristlet is traceable by a receiver that is installed in the participant's home, and which allows only restricted movement away from it. The receiver, in turn, is monitored via the telephone by a computer in a central monitoring unit. The participant's daily schedule is stored on this computer. The participant's presence or absence can then be compared to the information on the office computer, and if he or she fails to comply with conditions, the monitoring unit automatically contacts the probation service who will investigate the matter. Armlets or anklets cannot be removed without sending an alarm signal to the receiver, and is made of shock- and water-resistant materials.

Another type of electronic monitoring consists of a robotic telephone caller that places random calls from a central computer to offenders' home telephones. When the person answers, he or she is ordered to state his or her name and to make other verbal responses, which are tape-recorded. From this information officials can determine whether it was the offender who spoke, and also whether he or she was at home during prescribed times. Other devices that may be used in conjunction with a telephone are a visual device (that is able to identify a person's face), a voice-recognition system, and even an over-the-phone alcohol checking device.

4.4.2.3.2 Drug and alcohol monitoring

Drug monitoring consists of regular chemical testing for drug use and even skin checks for injection sites (McCarthy & McCarthy 1991:347). A blow-in device, similar to the one used by traffic officials, is normally employed to monitor alcohol use. Some of the most recent technology include alcohol testing devices that can be used *via* the telephone line.

4.4.2.3.3 Community service

Community service consists of uncompensated work for public or non-profit organisations. Community service serves a retributive function while at the same time gives the offender a chance to atone for his wrongdoings. It is also closely coupled to the restorative justice philosophy, where offenders are called on to admit what they have done wrong and to take steps to make amends. Performing community service in the environment that bears a relationship to the offender's crime could also improve his understanding of the consequences of his behaviour.

4.4.2.3.4 Attendance of treatment programs

ISP is especially suitable for certain groups of offenders - drug addicts in particular - where imprisonment is not an appropriate sentence, but where such people need close attention (Petersilia, Turner & Deschenes 1992:18-37). According to these authors, the use of drug-related offences has seen a dramatic rise in the United States in recent times. Some studies indicate that nearly 70 per cent of people arrested in major metropolitan areas have used drugs within the preceding 72 hours. In addition, the percentage of drug users in prisons has also increased at an alarming rate. In 1986, they accounted for approximately 10 per cent of the prison population; whilst ten years later (in 1992), 20 - 35 per cent of all prisoners in the United States were drug users.

4.4.2.3.5 Probation fees

Mullaney (1988:2-3) mention that service fees such as a fee for a presentence report, a drug or alcohol counselling fee and a probation supervision fee can also be acquired of the probationer.

4.4.2.3.6 Restitution

Restitution involves compensating the victim for loss or damage. When restitution is laid down as a condition for probation, the normal practice is that the probationer is ordered to pay a certain amount at the probation office once per month. The probation office then registers that a payment has been made and forwards a cheque to the victim.

As for the extent to which some of these conditions are applied in different ISP programs, the following table is based on information obtained from Byrne et al. (1989:16):

TABLE 4-2
CONDITIONS OF ISP PROGRAMS IN 31 STATES (1986)

Condition		Number using the condition	Percent
1.	Curfew/house arrest	25	80,6%
2.	Electronic monitoring	6	19,3%
3.	Drug monitoring	27	87,1%
4.	Alcohol monitoring	27	87,1%
5.	Community service	21	67,7%
6.	Probation fees	13	41,9%
7.	Restitution	21	67,7%

These numbers do not mean that the conditions mentioned must be adhered to by all probationers in an ISP program. It only indicates that a specific ISP program makes use of such a strategy (Byrne et al. 1989:16).

In 1995, the use of conditions for individual probationers under federal probation were as follows: 90,7 per cent had a special condition attached to their sentences, of which 11,6 per cent had to do community service, 34,0 per cent underwent drug treatment, 13,2 per cent were held under house arrest, 4,9 per cent were subjected to drug testing, 27,8 per cent had to pay fines, and 21,5 per cent make restitution (Adams, Roth and Scalia 1998:4). As these figures are for routine probation, it shows the extend to which the intensity factor of ISP has invaded ordinary probation.

A look at point 4.3.2., regarding the application of ISP, leaves one with the impression that, apart from the fact that ISP programs make use of the same pool of supervision practices and conditions, they differ widely with regard to the intensity with which the measures are applied. Even the differences between routine probation and ISP seems to become vaguer as ISP, on the one hand, is often applied leniently, and probation, on the other, is laid down with some of the conditions normally reserved for ISP programs. Petersilia (1998:6) contends that "...the name "ISP" really has no commonly agreed upon definition...It simply means "more than" what offenders in that location would have gotten in the absence of the ISP."

Having looked at the basic contents of ISP programs, the real point of interest, namely the effectiveness of these programs, will subsequently be discussed.

4.4.3 The effectiveness of ISP

Under this point the important issue about the effectiveness of IPS will be discussed.

4.4.3.1 Cost-effectiveness

Regarding diminished costs, one of the main outcomes expected from IPS is to serve as a cost-effective alternative to imprisonment. Significant cost reductions for IPS programs have been reported in the literature. The New Jersey IPS, for example, was shown to be about 30 per cent less expensive than imprisonment (Tonry & Will 1988:Chapter 2:26-27).

As a cautionary observation, Parent, Dunworth, McDonald & Rhodes (1997:4) mention that statements provided by agencies concerning the cost effectiveness of their programs are not always based on a cost-benefit analysis that adequately accounts for the real costs of sanctions or their alternatives¹. Most analyses inappropriately use average daily costs rather than marginal costs² to compute savings. The few studies that have attempted rigorous cost-benefit analyses of intermediate sanctions found that their cost-effectiveness were much less than originally expected, and that some ISP programs were just as costly as incarceration.

Another factor that determine the costs of probation has to do with the degree of supervision that is sought after. Intensive supervision invariably leads to higher costs because the officer/probationer ratio is much lower than with ordinary probation. To attain more control over offenders will therefore require more personnel which will mean that more funds will have to be consigned to probation, as Rosenfeld & Kempf (1991:491) put it: "...we get the level and type of correctional supervision we pay for."

¹ Byrne et al. (1989:25) contends that "net-widening" can lead to miscalculations, as the cost benefits of ISP against imprisonment should often be replaced by an assessment of its advantages relating to ordinary probation.

² "Marginal costs," according to Parent *et al.* (1997:5) refers to costs that do not vary with the number of offenders served, some that vary only if there are substantial changes in the number of offenders served, and some - such as consumables - that vary with each offender served.

4.4.3.2 Its effect on keeping offenders out of prisons

With regard to the belief that the use of ISP would lead to a reduction in prison figures, one of the biggest problems has to do with what is referred to as "net-widening." According to Austin & Krisberg (1982:377) alternatives to imprisonment have created:

1. Wider nets, in the sense that reforms have increased the proportion of persons whose behavior is regulated and controlled by the state.
2. Stronger nets, in that reforms have augmented the state's capacity to control citizens through an intensification of its powers of intervention.
3. Different nets, through the transfer of jurisdictional authority from one agency to another, or the creation of new control systems.

What net-widening adds up to, is that judicial officers are often not keen of sentencing options that interfere with their notions of laying down imprisonment for sentences that they think deserve it. Parent *et al.* (1997:3) observes that studies of intermediate sanctions generally found strong resistance among judicial officers to change existing sentencing patterns, especially if the change is intended to incarcerate fewer offenders. According to Petersilia (1998:6), ISP participants, for the most part, do consequently not exist of prison-bound offenders, but rather of high-risk probationers. Whilst program developers intended it to act as a substitute for imprisonment, well-meaning judges kept the perceptual guiding line between imprisonment and probation and filled the programs with high-risk probationers. They used ISP, in other words, to fill the gap that previously existed with regard to more intensive intervention for some probationers, but did not use it for those they think deserve imprisonment.

Because it is difficult for researchers to assess which offenders would have been sent to prison in the first place (mainly as a result of the individualisation of sentences), it is often

problematic to determine to what extent community-based sentences actually replace prison sentences.

4.4.3.3 Curbing recidivism

As for the objective that ISP programs would diminish recidivism, research has shown mixed results. In a substantial Maryland project, in which evaluations across the whole range of intermediate sanctions were evaluated, it was concluded that: "Except in a few instances, there is no evidence that these programs are effective in reducing crime as measured by official record data." (Sherman, Gottfredson, MacKenzie, Eck, Reuter, Bushway 1997:21). In an study by Petersilia and Turner, in which 14 counties in 9 states were evaluated, no differences in arrests between ISP and ordinary probation after a one year period were found (38 per cent for ISP participants and 36 per cent for routine probationers)(Petersilia 1998:7).

Interestingly enough, the combination of intensive supervision with treatment programs, in particular drug treatment, has shown promising results. According to Petersilia (1997:5), solid empirical evidence showed that in programs where offenders received both surveillance and participated in relevant treatment, recidivism declined by 20 to 30 per cent. Field (1991) found that community supervision with substance abuse treatment is twice as successful as parole supervision alone. The NCCD reported, with relation to drug offender treatment coupled with ISP in Florida, that only 11 per cent of drug offenders were convicted of new offences, while approximately 27 per cent of the offenders sentenced to prison were convicted of new offences during the 18-month follow up period (Florida Sentencing Commission 2002).

Buddress (1997:9) cites a three-year study by the Oregon Department of Corrections, where it was found that a striking 70 per cent reduction could be obtained by focusing on substance abuse and mental health treatment, employment placement, and cognitive/life skills education for offenders under supervision.

A further interesting aspect of recidivism, or the question of “does it work?,” is that there are actually two stories involved. For adults who are on probation for misdemeanours, data show that at least three-quarters complete their probation sentences successfully. Where felony sentences (in the USA) of probation is involved, and where supervision is minimal, though, recidivism rates are high (Petersilia 1997:4).

4.5 EVALUATION OF ISP

With this data in hand, the question is what should be made of ISP as a sentence. In terms of its preconceived goals of keeping offenders out of prison, to lower costs, and to reduce recidivism, it would seem that ISP has been a failure (except for the promising results obtained with the combination of these programs and drug treatment). Point 4.4.3 will take a closer look at how these figures should be understood from a broader perspective.

4.5.1 What does these figures mean in terms of effectiveness?

There are a number of ways of looking at these findings:

4.5.1.1 In terms of the real meaning of these failures

Concerning the cost-effectiveness of ISP, one solution would be to distinguish clearly between those offenders who need minimum intervention (those having a good risk prognosis, see point 4.3.3.3) and focus special attention, in terms of supervision and treatment, on the relatively small number of offenders who are in the high-risk category. This presupposes the development of effective risk-assessment tools, as well as effective revocation structures (see point 7.2).

As for the problems related to judicial discretion, one obvious solution would be to structure sentencing in line with the proposals of the justice model, according to which certain categories of offenders would automatically be placed under probation. Instead of the subjective decision-making processes inherent to an individualised sentencing system, such a procedure would, however, be in need of a continuous re-evaluation of the risk evaluation instrument that is used to determine the limits involved.

With reference to the failure of ISP to curb recidivism, an encouraging finding lies in the effectiveness of the use of intensive supervision coupled with treatment programs. The reason for its success is still unknown, since intensive supervision, on its own, did not show any promise in this regard, which is also the case with treatment without supervision. Research into the reasons for its effectiveness may hold important lessons for the future of corrections.

4.5.1.2 In terms of the ways in which it can be seen as effective

In spite of its failure in these (important) respects, there are also some reasons for describing these programs as a success. The first is that it can be seen as successful in terms of its use as an intermediate sanction - compared with routine probation they did provide the means for the offender to be held more accountable, and may also be safer for the community as a result of the closer supervision (Petersilia *et al.* 1992b:15).

ISP programs may also be advantageous in convincing the public and judicial officers that imprisonment is not the only way of thinking about punishment.

4.5.1.3 In terms of the failure of imprisonment

A third way in which one can look at probation, and at ISP in particular, is in comparison with imprisonment, especially when seen in the light of the dangers of imprisonment as a sentence. In other words, the value of probation should not only be seen in connection with its success of lowering recidivism and costs, but as replacement for imprisonment.

In this sense, probation can be seen as a much more humane instrument of control, in which many of the brutalising effects of imprisonment can be effectively avoided. A more compelling reason for using it, from the author's viewpoint, is that it offers hope and a chance for the probationer to get his or her life in order, in contrast with imprisonment, which often tends to aggravate the offender's situation.

4.5.1.4 In terms of its application

A difficult aspect to determine empirically has to do with the application of probation. Probation, in contrast to incarceration, holds both the advantage and the dilemma of flexibility, which means that it is both an ideal way of applying the principles of treatment on an individualised basis but can also aggravate criminogenic factors by being misapplied.

In contrast with imprisonment, where adherence to the basic rules and regulations is usually sufficient to make an institution function effectively, probation requires a much greater effort from the probation officer. It often requires inventiveness where opportunities in the community must be exploited in new and creative ways, and where the rules are not always so obvious. Having worked both in prisons and in a probation office, the author got the impression that this last way of functioning is much more exciting as regards to the possibilities that it offers but requires, at the same time, much more responsibility from the probation officer.

4.5.1.5 In terms of its limitations

What is important to bear in mind is what can not be expected of ISP. According to Benekos (1990:53): "Community-based corrections is not and should not be viewed as a panacea for the massive problems presently being experienced by our correctional system."

It can also not be expected from probation (or from imprisonment, for that matter) to solve the socio-economic problems that may have led to the offender's situation in the first place. What is important to consider, then, is what can possibly be achieved within the framework that is provided to us.

4.6 CONCLUSIONS

One of the main arguments of this study is that the success of probation - to a much larger degree than imprisonment - depends on the way it is applied. It can be said that its advantages are necessarily inherent in the sentence as such, but depends to a large extent on the efforts and capabilities of probation officers to make it successful.

An important lesson that can be learnt from the application of ISP is that maximum intervention is not necessarily more effective in curbing recidivism than the minimum approach followed in routine probation.

What is important to bear in mind considering the shortcomings of probation, however, is that these should not be seen in isolation, but should be compared to the consequences of imprisonment. As such, it is the contention of the researcher that probation is the preferable option in almost all cases where community safety is not unnecessarily imperilled by its use.

In the following chapter, the ideological and practical aspects relating to probation will be investigated, and four models of probation - based on different philosophies of punishment - compared to determine what their respective significances are.

CHAPTER 5: MERGING THEORY AND PRACTICE: FOUR MODELS OF PROBATION

Chapter 5 can be seen as a continuation of chapter 4, but in this chapter some of the most recent philosophies on the field of corrections are brought into the picture. The purpose is to pose four different models of probation against each other and to evaluate them according to their usefulness relative to each other.

According to Tonry (1999:3), there are four competing conceptions of sentencing and corrections that coexist in the United States today. These are:

1. Indeterminate sentencing that emphasizes the treatment of offenders.
2. Restorative sentencing, which focuses on rectifying the injustices created by the crime towards the victim and society.
3. Risk-based sentencing, which starts from the premise that public safety should be the overriding goal and individualised risk management the most promising strategy.
4. Comprehensive structured sentencing, which is based on the supposition that judicial discretion is the biggest single danger to fair sentencing practices, and that a structured approach is the only viable safeguard against this.

Although the penal scenes in most countries (in South Africa, for example) include elements of most of these models, it is important to note that they are actually irreconcilable in some ways. Where structured sentencing, for example, attach much value to treating similar crimes alike, rehabilitation and restorative justice approaches focus on the individualisation of cases. In addition, Tonry (1993:3) remarks that some programs, although they are probably compatible with all four approaches, differ in scope according to their perceived functions in each system. Community service is one example that could be used by proponents of the

treatment stance to effect expiation, by advocates of restorative justice as symbolic restitution, and by advocates of the structured approach as just deserts.

To demonstrate the similarities and differences between these four approaches, each one will subsequently be examined.

5.1 REHABILITATION MODEL

The rehabilitation model is the most basic model, and is founded on the idea - created by John Augustus - of the probation officer acting as a benevolent benefactor, who looks after offenders and reports back to court on their progress. In line with the ideals of the rehabilitation model, probation officers later on were given the added responsibilities of acting as treatment agents, mediators and community facilitators, who had to assist the offender in reintegrating successfully into the community

5.1.1 Description

The application of the rehabilitation or treatment model of probation has certain unique characteristics:

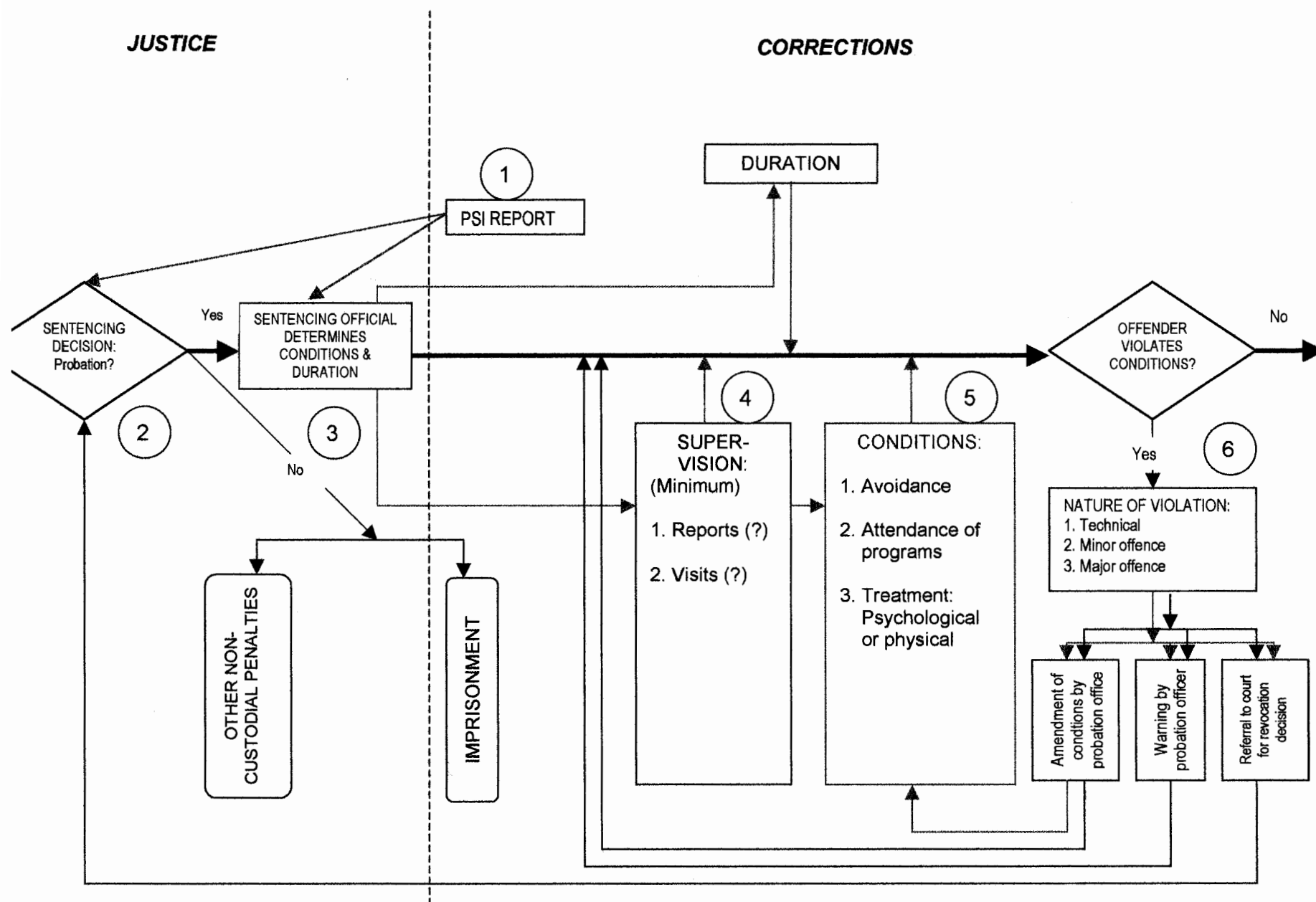
- The probation officer is seen as a caseworker and helper, who has the task of reintegrating the offender effectively into the community and to change him or her into a well-adjusted, law-abiding citizen (Lawrence 1991:449). According to Lawrence, the three primary goals of community corrections from a rehabilitation viewpoint are diversion, advocacy and reintegration.
- Although the focus is on rehabilitation, the probation officer has coercive power to compel probationers to take part in rehabilitation programs (Lawrence 1991:449).

- The rehabilitation model of probation is based to a large extent on the motive of reintegration, where the probation officer must assist the offender – as far as possible – to become a useful member of society again.
- Closely coupled to the reintegration motive is the goal of advocacy. Advocacy rests on the principle that the probationer needs an advocate for referral and acceptance into the community, particularly to such sources as housing and employment (Lawrence 1991:451).
- Surveillance and control takes on a lesser role in this model (Lawrence 1991:449).

5.1.2 Sketch

JUSTICE

EXITING SYSTEM



5.1.3 Explanation

The rehabilitation model of probation differs somewhat in application from rehabilitation in prisons, since indeterminate sentencing as such does not play such a vital role, and the emphasis is more on the successful reintegration of the offender into the community. Consequently, the probation model would not normally involve coupling the duration of sentences to their rates of rehabilitation (although in some jurisdictions in the United States probation officers have the authority to shorten or lengthen sentences in accordance with the cooperation of the client). Referring to diagram 5-1, the process followed in a rehabilitation model can be described as follows:

Point 1: The process will normally commence with the sentencing official requiring of the probation officer to complete a presentence report based on a presentence investigation of the offender, his (or her) circumstances, and his prognosis with regard to probation as a sentencing option.

Point 2: In accordance with normal rehabilitation practice, the decision on whether probation should be used instead of imprisonment is left to the discretion of the sentencing official, who bases her decision on her evaluation of the case, and the individual circumstances as sketched in the presentence report. In accordance with the medical model, the interests of the offender would carry more weight in this decision than the seriousness of the offence.

Point 3: In this model, the sentencing official also determines the duration of the sentence and the basic conditions, even though it is implicitly understood that the probation officer also has some decision-making capacity to devise a specific treatment strategy (known as case management), especially once the sentence of probation is in progress. Probation officers, however, do not have the power to overrule any of the judge's initial decisions concerning the duration of the sentence or to change the conditions laid down by the court.

Point 4: As the emphasis in the rehabilitation model of probation is not on control as such, but rather on the welfare of the client, supervision normally plays a minor role. What is usually expected of a probationer is to report on a regular basis to the probation office, although visits of probation officers to the homes or workplaces of probationers may be included as well.

Point 5: Conditions coupled to a sentence of probation in this model are not basically meant to serve any punitive or controlling purpose, and are therefore not usually adjustable so that it can be made more severe or lenient, depending on the cooperation of the probationer. Apart from those conditions that are coupled to the avoidance of crime-inducing behaviour (such as to avoid contact with criminal elements, avoiding the use of alcohol or drugs, or to abstain from further criminal activities), probationers are normally only required to attend compulsory rehabilitation programs or treatment sessions, if they are thought to be in need of it.

Point 6: Decisions on possible revocations when probationers violate conditions is normally left to the judgment of the probation officer. In cases of re-offending, cases are, as a rule, referred back to court for a decision. Although major offences would normally lead to the revocation of the sentence of probation into imprisonment, with minor offences the judge may decide that it would be in the best interest of the probationer to continue with his or her sentence. In the case of technical violations it is normally up to the probation officer to decide

on the fate of the offender. She can do so either by warning the offender and allow him to continue with the sentence, or amend the conditions in terms of additional measures.

5.1.4 Evaluation

Looking at the structure of this model, one can see that it is a relatively simple procedure, with little expected of the probationer. A lot is required from the probation officer, though, who not only has to act as functionary of the court in compiling presentence reports, but has the added tasks of monitoring offenders and to apply treatment that would lead to rehabilitation.

In practice, mainly because of under funding and the resultant overloading of caseloads, little comes of these purported tasks. In some cases, as mentioned in point 4.2.3.1, probationers complete their probation sentences without even meeting their probation officers once. It comes as no surprise that probation is therefore generally known as a “soft option” and that it fails in its mission to reform offenders.

Findings on the effectiveness of certain treatment strategies for selected groups of offenders (drug addicts in particular), have shown that there is a possibility of this model leading to reduced re-offending, but that it should be applied on a much more structured and intense basis (see point 5.3 on the control model).

5.2 RESTORATIVE JUSTICE MODEL

The restorative justice model (as interpreted here) is perhaps nearest to the rehabilitation model as concern its aims and functioning.

The emergence of community or restorative justice is a relatively new way of thinking about the tasks of criminal justice, but is spreading rapidly into corrections systems, mainly on the

terrain of community-based corrections (Tonry 1999:4, Bartollas & Conrad 1992:207, Samoff, 2001:33).

5.2.1 Description

Restorative justice can essentially be seen as a rejection of the criminal law's focus on culpability and retribution. The emphasis in this viewpoint is to restore those who have suffered damage (the victim and his or her family), the community, and even the offender (who is a part of the community and who continues to be a threat to society if he is left "unrestored")(Smith 2001:3). According to Samoff (2001:34), restorative justice is rooted in "indigenous"¹ methods of conflict resolution, such as "...peace making, talking circles, family or community gatherings, and mediation." Some of the practices that are related to this initiative are sentencing circles², group conferencing, family group conferencing, and victim-offender mediation programs (Tonry 1999:4, Samoff 2001:35).

Kurki (1999, *cited in* Samoff 2001:33) makes the following assumptions about restorative justice:

- Crime consists of more than violation of criminal law and defiance of government authority;
- crime disrupts victims, communities, and offenders;
- the primary goals of restitution are the repair of harm and healing of victim and community;
- the victim, community, and offender should all participate in determining the outcome of crime - government should surrender its monopoly over the process;
- case dispositions are based on victim and community needs, not solely on offender needs, culpability, danger or criminal history;

¹ Referring mainly to the dispute solution tactics of more "primitive" cultures.

² A native American-Indian practice.

- components reflect a holistic philosophy.

On close inspection, it is obvious from these assumptions that restorative justice is quite different from the present-day justice system. It requires, in essence, the rejection of the fundamental notions of justice, crime and punishment, and replaces it with community justice, where crime is not so much seen in terms of its moral wrongness, but according to the damage caused by it, and punishment is substituted by restoration.

Although these ideas sound credible, and enjoy a fair amount of public support, a number of questions can be raised concerning its practicality:

- The first question is whether these solutions, that may work well in small, close-knitted cultures, are relevant in the contemporary individualised set-up, where the emphasis is more on community safety than on the restoration of relationships between individuals.
- A related question is whether restorative justice would not, by its very nature, work best in situations where long-standing relationships (such as family disputes) are involved and, if this is the case, whether it would not be severely limited in terms of its applicability to the wider crime situation.
- Related to the problem of limited applicability, a further question would be whether the use of restorative justice would not invariably lead to net-widening.
- A fourth reservation lies on the terrain of the individual role players: whether victims would be interested to get involved in restorative justice programs and if most offenders are really remorseful about their conduct.
- A further difficulty on a practical level is that many offenders do not have the means for restitution, or are indigent, unable to work, or unwilling to make restitution payments (Samoff 2001:36).

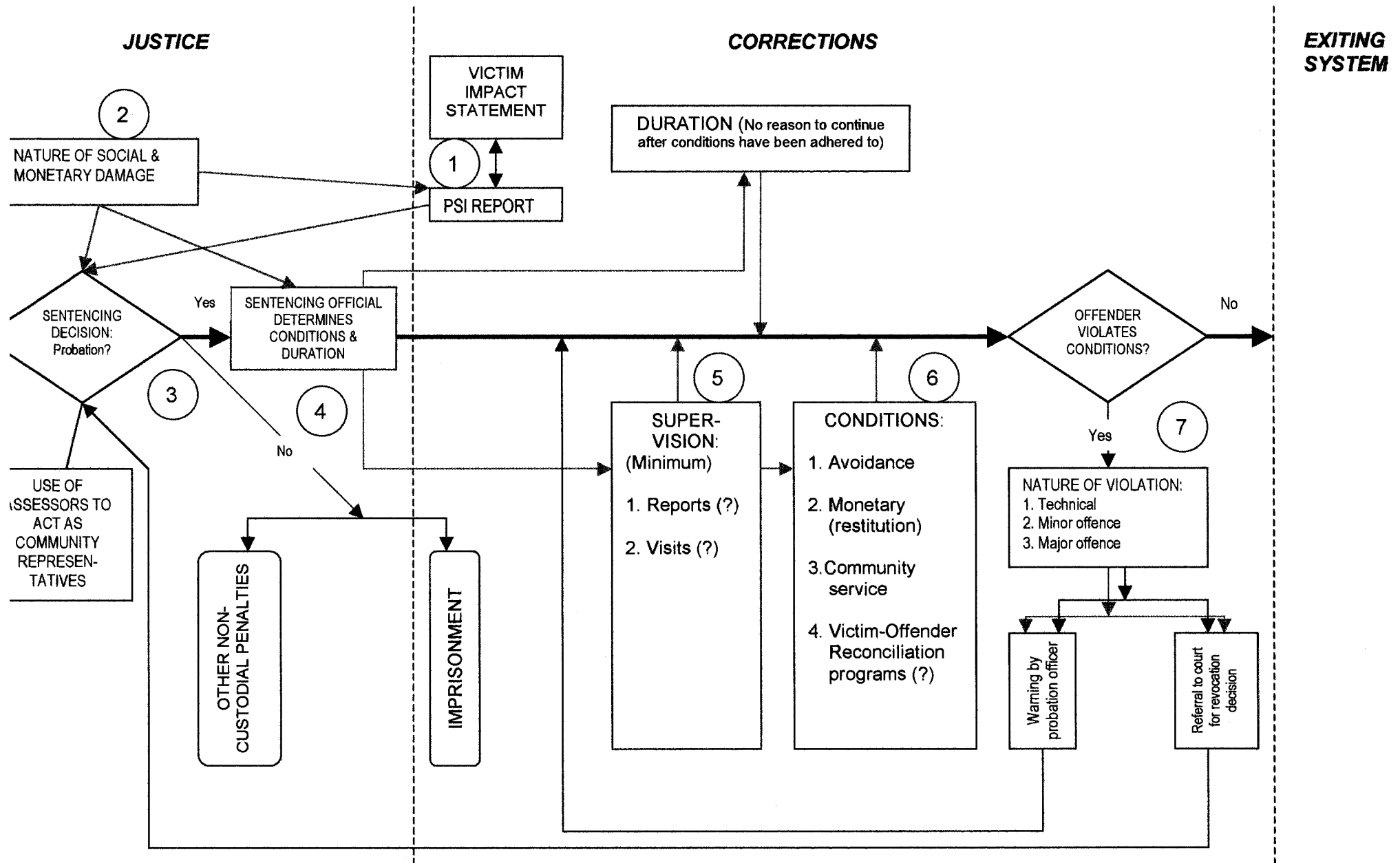
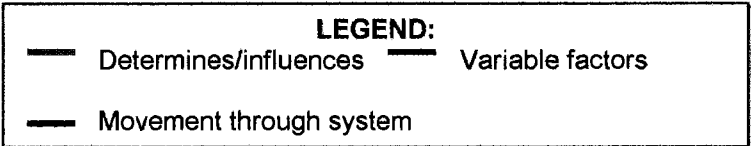
The root of the problem is that there are certain fundamental differences between restorative justice and ordinary criminal justice. This has led to a situation where the judiciary pays lip service to the ideas of restorative justice but limits its use to the introduction of a few restorative justice practices into the traditional system, such as victim-impact statements (that are sometimes required in addition to the presentence report), restitution payments, and community service (Lawrence 1991:454-455).

When the applicability of restorative justice to probation is considered, a major problem is that the use of restorative justice techniques, such as victim-offender mediation and family group conferencing, as conditions to a sentence of probation, may lead to artificial situations, where offenders are forced to show remorse in order to avoid imprisonment. This clearly opposes the basic intentions of restorative justice, since no real solutions could be achieved where honesty is not involved.

Apart from this, the main conditions that may be required of an offender is to pay restitution and to perform community service, which acts as restitution to the community. The following diagram can be drawn of a system based on restorative justice principles:

5.2.2 Sketch

DIAGRAM 5-2: RESTORATIVE JUSTICE MODEL



5.2.3 Explanation

Portrayed in this way, the structure of the restorative justice model is the closest to the rehabilitation model, mentioned under point 5.1. It can be explained as follows:

Point 1: Just as with the rehabilitation model, the process starts off with the court requesting the probation officer to complete a presentence report. In the case of restorative justice, a victim impact statement may also be required to give the judge more insight into the effects of the crime.

Point 2: In accordance with its principles, the emphasis in this model is on the nature of the real damage in terms of its impact upon people, and not so much in terms of the culpability of the offender in a more abstract sense.

Point 3: In keeping to these principle, the judge would give prominence to community-based dispositions (including probation) instead of incarceration, as the main purpose of this model is to restore relationships within the community. The sentencing official could also make use of assessors (in the role of community representatives) to assist him or her in deciding on a suitable sentence.

Point 4: As in the rehabilitation model, the nature of the conditions would be taken on an individualised basis. In this case, the interests of the victim and the community would receive prominence. Concerning the duration of the sentence, it may just as well be indeterminate since this model focuses not so much on probation as punishment, but rather on the outcomes of this measure. If the conditions are fulfilled, there are no further reason to continue the sentence.

Point 5: Supervision may be minimum as no real purpose is to be attained by it. It may perhaps be used to determine to what extent community restoration has been attained, but in that case it could be more accurately described as visits than as supervision.

Point 6: The conditions to be included in this model must serve the purposes of restoration. As discussed above (point 5.2.1), the only practical measures that are normally used as conditions for probation are restitution and community service, since non-compliance with measures that involve sincere deliberations can be seen to defy the goal of restoration. Avoidance measures can also be included as they obviously serve the best interests of the community.

Point 7: Where conditions have been violated, the sentence can either continue after a warning from the probation officer, or referred back to court for a revocation decision, depending on the nature of the violation.

In conclusion it can be stated that a restorative justice model would require minimum intervention, apart from the requirement that conditions related to reparation may be required. The function of the probation officer is mainly to see that the probationer adhere to these conditions and to act as a mediator between the different parties.

5.2.4 Evaluation

Although restoration, as such, is a retributive principle, the restorative justice model - with regard to its structure - is nearest to the rehabilitation model discussed in point 5.1. In this regard, the emphasis is not on the interests of the offender alone, but on the well being of all interested parties. The traditional role of the probation officer as treatment agent, mediator, and advocate is not changed much, except in terms of emphasis, and this system would probably be acceptable to treatment oriented probation officers.

As far as conditions are concerned, a major problem in relatively poor countries such as South Africa, has to do with the collection of restitution payments. Meintjies-Van der Walt (1998:39) provides three reasons why compensation awards as part of a probation sentence in this country are problematic:

1. The writer firstly remarks that a very real problem in the South African context is that offenders are likely to emanate from the poorer strata of society, which implies that compensation is an unlikely disposition.
2. A second problem mentioned is that sentencing officials may have problems applying, what is normally seen as a civil matter issue, with criminal sentencing when calculating a suitable quantum. She cites a recent case (*S v Lombaard* 1997(1)SACR80(T)) where the court denied an application for a compensatory order in terms of section 300 of the Criminal Procedure Act (51 of 1977) by finding that the determination of compensation was a complicated civil matter which could only be decided if all points in issue were defined in pleadings and evidence was led.
3. A third problem area concerning compensation orders was touched on in *S v Medell*, where the accused was convicted of theft and sentenced to 30 months correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977. In review it was held that imprisonment in default of such a payment could not be ordered, as incarceration for failure to pay a debt has been held unconstitutional in various cases.

Because the issue of restitution is central to the ideology of restorative justice, the inability to enforce its payment constitutes a serious setback for restorative justice.

A further question that may be asked is how relevant restoration would be in cases of so-called "victimless crimes," such as traffic offences, where there are no actual victims or damage involved.

5.3 RISK-CONTROL MODEL

Probation programs that focus on community safety and the effective control of offenders can actually be seen in terms of recent developments on the terrain of corrections, where the interests of the community started to gain more importance than those of the offender. At a time stage when most people are in favour of the use of imprisonment and longer terms of incarceration, the root of the problem concerning probation lies in convincing people that it can indeed be safe. The idea of effective control is based on a need to create the perception of punitive, get-tough sanctions to satisfy social and criminal justice needs for controlling and punishing offenders (Benekos 1991:56).

The problem of public opinion is aggravated by the fact that the media, especially in countries with a free press, can easily blow up single cases to create the perception that a problem is more wide-spread than it actually is. Violent crimes by probationers and parolees give the impression that community-based corrections are ineffective, and permit dangerous criminals to roam the streets. The effective control of offenders in the community therefore becomes crucial to the survival of programs, and this is why community safety is stressed to such a degree in probation programs nowadays.

5.3.1 Description

Intensive Supervision Probation (ISP) itself is largely based on the principles of control in contrast with earlier models of probation that stressed the rehabilitation of offenders.

According to Petersilia (1988:167), the goal of probation today is not to rehabilitate the offender, but to control him, with public safety as the central concern. To a certain extent, the goal is to change ISP into prisons in the community.

Another way of looking at the application of risk-control probation is to see it as a shift in the role of the probation officer: The task of the probation officer has shifted from that of being an advocate for the probationer (see point 5.1) towards the adoption of an adversarial role, where probation officers view themselves as advocates for the court, the criminal justice system and community protection (Lawrence 1991:454).

There are a number of possible ways of in which probation programs can ensure the safety of the community:

1. The first way to ensure community safety is by the effective screening of candidates for probation; to distinguish between those who pose a significant threat to society and have to be detained in prisons, and those who can be managed in the community. In the past, risk assessment was largely a subjective matter, where PSI-reports were based on the probation officer's assessment of the offender according to his or her professional experience in the field. Today, the emphasis is on more objective and scientific classification instruments based on criteria which show a positive correlation with recidivism.
2. A second screening process takes places within probation itself, where risk control instruments are also used to classify offenders consistent with to the risk they pose and to apply control measures accordingly¹. This is also advantageous in terms of the use of resources, where limited resources such as man hours, treatment programs and money can be reserved for high-risk cases.

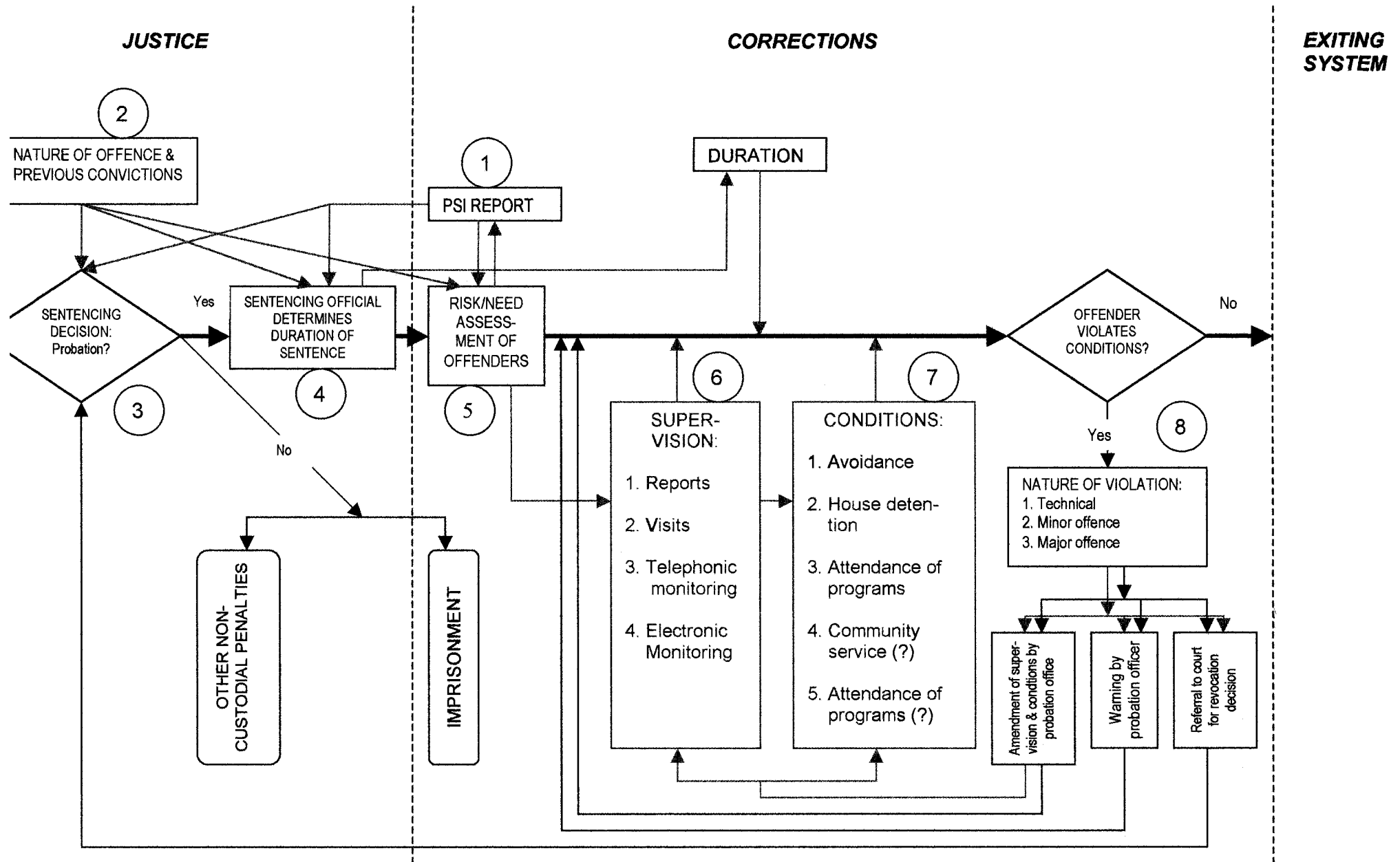
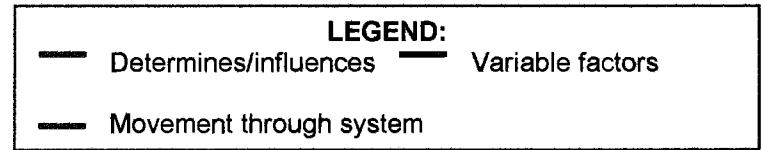
¹ According to Dowdy *et al.* (2002:29) correctional agencies in America and Canada are increasingly making use of offender classification assessments. These assessments evaluate risk of future recidivism and/or social and psychological needs.

3. A third method used to ensure public safety is effective supervision. In the ISP model, this is provided by measures such as the intensive supervision of offenders, house arrest, and electronic monitoring. In recent times, with immense advances made on the field of technology, electronic monitoring - and especially GPS-systems - will in future probably provide supervisors with unequalled capabilities regarding the supervision and tracing of offenders in the community.
4. Fourthly, risk can be reduced by treatment, especially with regard to certain groups-at-risk, such as substance-abusers, violent offenders, or sexual offenders, who have been shown to provide good prognoses on treatment. Employment programs, literacy programs and community service programs have also been found to result in risk reduction (Bartollas & Conrad 1992:233).

All of these measures can be included in a risk-control model of probation. The following sketch based on risk-control as a central function of probation can be drawn:

5.3.2 Sketch

DIAGRAM 5-3: RISK-CONTROL MODEL



5.3.3 Explanation

As mentioned above, the main focus of the risk-control model is on controlling the behaviour of probationers to such an extent that the safety of the community can be guaranteed.

Point 1: For the purpose of screening offenders, a risk/need assessment of offenders is done (point 5), that can be used to compile the Presentence Investigation Report (PSR), and to determine the nature of the supervision and conditions (points 6 and 7). This process can also be reversed, in that the data obtained in a normal PSI report can be used to compile a risk/need assessment, which will determine the nature of the supervision and conditions of the sentence.

Point 2: In order to accommodate the greater emphasis on deterrence and retribution, the nature of the offence and the previous convictions (point 2) are of more importance than in a rehabilitation-based model. These factors may influence the sentencing decision (point 3), the duration of the sentence (point 4), as well as the risk posed by the offender (point 5).

Point 3: In this model, a sentence of probation can either be at the discretion of the sentencing official, or as the result of a presumptive or mandatory sentencing system, where probation is the prescribed sentence for certain categories on a sentencing guidelines matrix (see point 2.1.3.2.3.1).

Point 4: In the case of a structured sentencing system, the duration of the sentence will obviously also be prescribed by the sentencing guidelines. Otherwise the magistrate or judge will decide on the length of the sentence.

Point 5: Where a risk/need assessment is used primarily to determine the strictness levels of supervision and the conditions adhered to the sentence, it can take place after a sentence

has been laid down. Risks and needs are usually determined according to a statistical model predicting the risk-levels of individuals and showing any problem areas (needs) that should be addressed.

Point 6: Intensive supervision is the key element in the control model. It can basically be obtained by four means: Reports (either in written form or physically in terms of visits to the probation office), visits by supervision to the home or workplace of the offender, telephonic monitoring of probationers at their homes or workplaces, and electronic monitoring (passively or actively). In diagram 6-3 the coloration of the box shows that both the quantity of measures as well as the measures themselves are scalable. This can be used:

1. As variables to ensure differential treatment for different clients based on their degree of risk as assessed by the risk/need assessment instrument; or
2. As adjustable measure to punish or reward an offender based on his or her degree of cooperation (determined by his or her adherence to the conditions).

Insofar as the management of scarce resources, specifically man-hours, is concerned, the advantages of such a variable system are that resources can be structured on a risk/needs basis. Another benefit is that condition defaulters can be managed internally - in other words the degree of supervision, for instance, can be increased instead of referring such a person back to the court for a revocation decision. On the other hand, this graded system can also be used on a predetermined time-scale basis to reward cooperation.

Point 7: Although various conditions can be attached to a sentence of probation, the emphasis of a purely control model will obviously be on conditions that avoid negative behaviour (such as desisting from committing crime, associating with criminal elements, etc.) and on restrictive measures such as house arrest. With the current emphasis on the treatment for certain types of offenders, compulsory attendance of programs can also be prescribed as

a condition. Similar to supervision, conditions can also be scaled to differentiate between offenders on a risk/needs basis and to act as a punishment/reward measure.

Point 8: The procedure when conditions have been violated is fairly self-explanatory.

Depending on the nature of the violation, three steps can be taken: a)The case can be referred back to court for a revocation decision, b)a warning can be issued by the probation officer in which case the offender continues with his or her sentence as it is, and c)the supervision and/or conditions can be made more severe, depending on the nature of the violation.

5.3.4 Evaluation

There are three persuasive reasons for administering probation according to a risk-based model:

1. The insistence of the public that society should be protected against criminal elements.
2. Judges' hesitancy to impose community-based sanctions because of their concern for public safety.
3. Adverse publicity and loss of trust in community-based programs when offenders under probation commit crime – especially when violent crimes are committed and such violations get media attention.

In essence these reasons have to do with public perceptions about the safety of community-based corrections. This can be related to the need for intermediate sanctions, to act as a feasible alternative to imprisonment.

Its main drawback is that it has been found that close monitoring and multiple conditions escalate condition breaking, in other words that, the more closely a probationer is monitored, the more violations (especially technical violations) will be detected. Although the scaling of conditions, in lieu of imprisonment, can assist in limiting the number of probationers reverted to prison, each probation office will have to have an unambiguous policy on how much violations they will tolerate - where too much emphasis on discipline will lead to an outflow of probationers to prison (which defies its primary goal of keeping offenders out of prison), whilst too little discipline will lead to a loss in confidence from the public and the courts.

Another issue concerning this model has to do with the effectiveness of screening methods. Where probation was traditionally reserved for first-time and low-risk offenders, its use as a meaningful alternative to incarceration implies that higher risk offenders will have to be considered for probation. The development of effective screening instruments, firstly to decide on which offenders can safely be released into the community, and secondly to determine the risk so that special attention can be given to them, is therefore of the greatest importance.

5.4 STRUCTURED MODEL

Although purely structured probation systems as presented in diagram 5-4, to the knowledge of the author, do not exist in practice, this illustration has the purpose of providing the possibility of such a model for the purposes of comparison.

5.4.1 Description

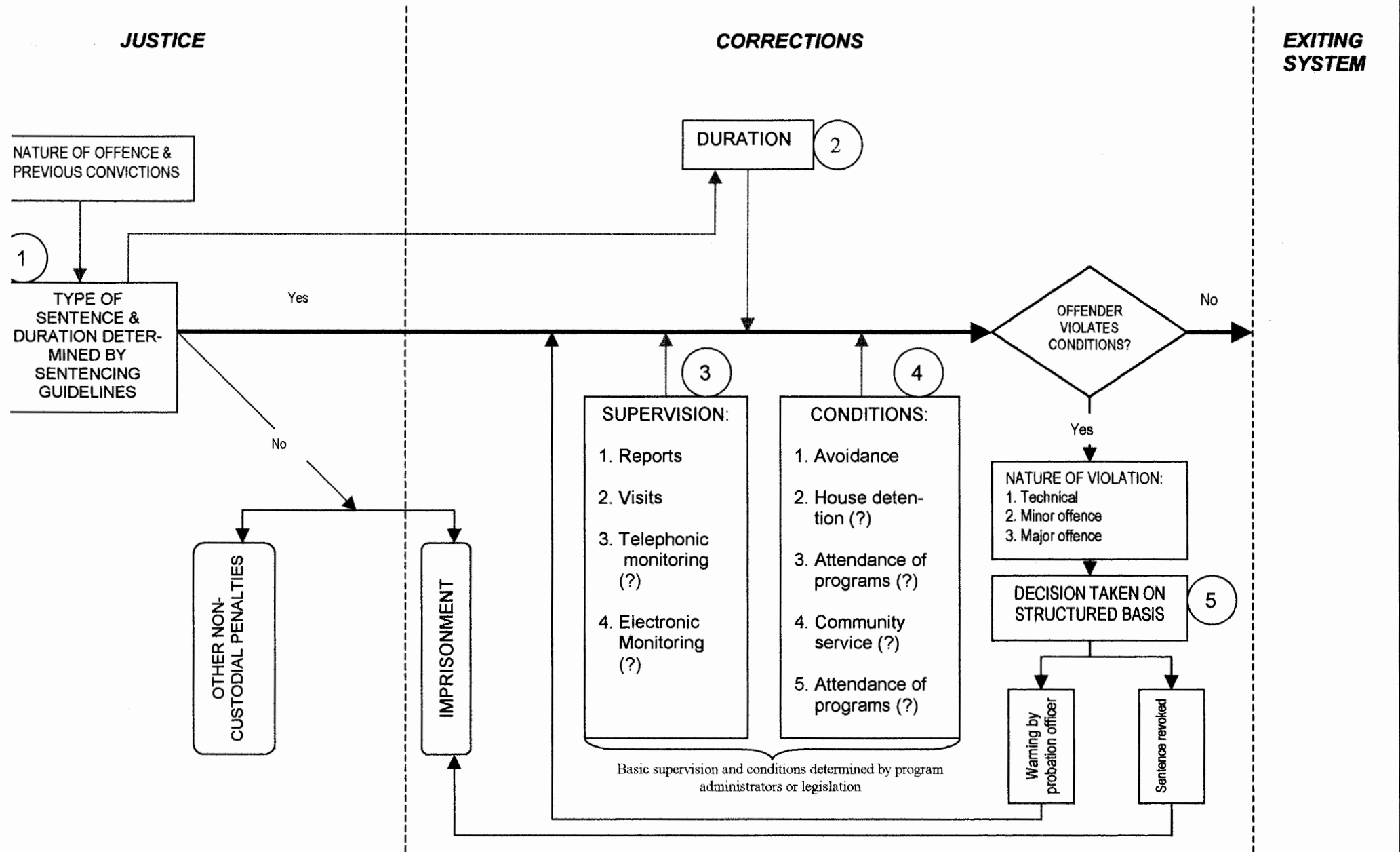
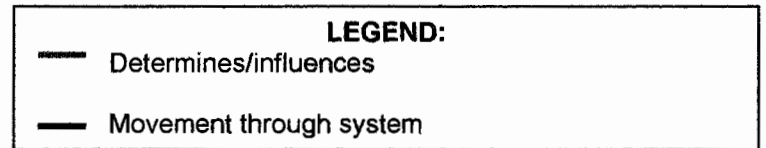
A purely structured model of probation should be based on the "justice as fairness" philosophy of the justice model (see point 2.1.3.2.1). In this respect, it will have to adhere to the following principles:

1. A sentencing guidelines system that will determine the type of sentence (i.e. probation or imprisonment) as well as the duration thereof, based on the nature of the offence and the previous convictions of the offender.
2. Like terms of probation for offenders in the same seriousness categories.
3. That supervision and conditions will be determined by legislation or program administrators and that they are not adaptable on an individualised basis.

Although the emphasis of this model is on delivering justice (in the sense of proportionality), it would not exclude measures aimed at bringing about the goals of deterrence, incapacitation or rehabilitation. The main condition is just that similar consequences should befall similar categories of offenders.

5.4.2 Sketch

DIAGRAM 5-4: STRUCTURED SENTENCING MODEL



5.4.3 Explanation

It is obvious from diagram 5-4 that the structure of this model is fairly simple. It can be explained as follows:

Point 1: As mentioned under the previous heading, the sentencing decision is replaced by a sentencing grid system, according to which only the nature of the offence and the number of previous convictions are considered.

Point 2: The duration is also determined by the sentencing guidelines.

Point 3: Although regular reports to the probation office and visits of the probation officer to the home or workplace may be regular features of such a system, they are not adaptable in the sense of tailoring them to the needs of the probationer, as one of the assumptions of this model is that similar offenders should be treated alike.

An alternative would be to make the degree of supervision flexible, although in such a case a quantified decision-making process should be used according to which offenders would know precisely what the consequences of their actions would be.

Point 4: The same argument may be applied to the conditions of such a model. Even though different conditions may be applied, they will basically have to be the same for similar groups of offenders. Community service and house arrest, nonetheless, may be utilised to convey the idea of just deserts. In the case of adaptable conditions, the system should again be subject to a structured decision-making process.

Point 5: In the absence of adaptable systems of supervision and conditions, only two options are possible: either a warning or an automatic revocation of the sentence to imprisonment. To

ensure fairness towards everyone, such decisions would have to be taken on a structured basis, in other words the seriousness of various offences should be tabled and decisions taken on a quantified basis.

5.4.4 Evaluation

As concluded in chapter 2, the uniform treatment of offenders, where perceptions about equal punishment for similar crimes are equated with justice, should be the predominant theme in corrections. This model can then be seen as just in the sense that similar offence categories are treated alike and that it sends a clear message to society about the consequences of certain actions. In an attempt to remove bias from the process, it also make use of a structured decision-making process regarding possible revocation decisions.

To be blunt, however, this model does not seem to fit in well with probation. The rigid way in which it deals with offenders and its lack of attention to individual progress or failure can even be seen as unjust on the other side of the spectrum.

5.5 SUMMARY AND CONCLUSIONS

Comparisons between the different elements of the four probation models can be tabled as follows:

TABLE 5-1: COMPARISONS BETWEEN FOUR MODELS OF PROBATION

	Rehabilitation model	Restorative justice model	Risk-control model	Justice model	Most acceptable strategies
Underlying Motives	Rehabilitation, with some deterrent, incapacitating and punitive measures inherent in probation model.	Restoration (which can be seen as a utilitarian function of retribution).	In order of importance: Incapacitation, Deterrence (and Rehabilitation in terms of its deterrent value), Retribution.	Retribution, with a lesser emphasis on deterrence, incapacitation and rehabilitation of the offender.	Retribution, as discussed in chapter 2
Sentencing structure	Purely discretionary, based on information provided in the PSI-report.	Discretionary, depending on the nature of the case as presented in the PSI-report.	Either structured or discretionary. If discretionary, dependent on information provided in PSI-report and/or Risk/need assessment evaluation.	Purely structured model.	Mandatory or presumptive sentencing guidelines
Duration of the sentence	Determined by sentencing official - can be lengthened or shortened by probation officer dependent on cooperation and rate of rehabilitation.	Basic length determined by sentencing official. No need to serve the whole sentence if envisaged goals have been obtained.	Prescribed either by sentencing official or sentencing guidelines.	Prescribed by sentencing guidelines - set duration..	Set duration according to guidelines - should be able to reduce it when cooperation is obtained
Use of risk/needs instruments	No	No	Yes - either before sentence to determine the sentence, and/or after sentence to determine degree of supervision and conditions.	Yes - (same as with risk-control model)	Extensive use of and experimenting with risk/needs assessment models
Supervision procedure	Minimum prescribed supervision, emphasis on meaningful intervention.	Minimum prescribed supervision, emphasis on attainment of restorative goals.	Maximum required supervision according to directives by sentencing official, risk/need assessment of probationer.	Degree determined by risk/need assessment.	Variable in accordance with risk/needs & seriousness of crime

Supervision elements	Can include reports (either written or by reporting physically to office), infrequent visits, and infrequent telephonic monitoring.	Minimum prescribed (supervision not emphasis).	Can include the following: 1. Reports 2. Supervision at home/work 3. Telephonic monitoring at home/work 4. Electronic monitoring.	Elements determined by risk/need assessment.	Emphasis on electronic monitoring
Conditions	Usually only avoidance measures, may include compulsory treatment.	Can include restorative conditions such as restitution and community service.	Emphasis on deterrent measures such as avoidance conditions and house arrest (with or without electronic monitoring). Other conditions dependent on results of risk/need assessment, such as attendance of programs/treatment, and community service.	As prescribed by risk/needs assessment. Can emphasize retributive conditions such as restitution and community service.	Adaptable according to risk/need assessment but based on a minimum intervention strategy
Violation procedure	Decision left to probation officer - would normally refer further offences to the court for decision	Same as with rehabilitation - could be somewhat more lenient as restorative principles are not attainable in prison	Stricter procedure as a result of the safety of the community as primary concern. Use of intermediate sanctions in place of direct referral to court	Standardized revocation procedure	Standardised procedure-based on intermediate sanctions.

5.5.1 Evaluation of different models

In review, the strong and weak points of the various models, as are evident from the discussions above, can be summarised as follows:

5.5.1.1 The rehabilitation model

As for the rehabilitation model of probation, it could be that the mission of this approach (to successfully reintegrate and rehabilitate offenders) is just too vague and broad to have much use in practice. Especially in situations where probation systems are congested in terms of

numbers, and where obtaining sufficient funds is a problem, probation officers have little chance of controlling their clients, not to mention rehabilitating them.

It would seem that some added control over offenders is required of probation today, especially in the light of the current emphasis on community safety and risk control.

5.5.1.2 The restorative justice model

The main advantage of this model is that it could present a way of extending justice to the victim of the crime, and also of making the offender accountable for his or her actions.

Community service, as a way of exacting reparation from the offender, can also be advantageous. Apart from delivering a tangible service to society, it can possibly hold some rehabilitative advantages. Making community service visible to the public can also be used as advertising to promote probation as a sentence.

As for its disadvantages, there are limitations in terms of the types of crime that it can be used for. It would, for instance, probably not satisfy the community's sense of justice if a rapist gets away with an apology at a victim-offender mediation session. Because of the fact that it is (probably) most appropriate for minor offences, and would involve a substantial input in terms of organisation and manpower, it is hard to imagine the widespread implementation of restorative justice initiatives. Although it may be argued that its ideology is popular amongst members of the public, it may well be asked whether it is the idea of being repaid or the idea of restoring relationships with a stranger that carries most weight in the public mind.

In terms of the adaptation of restorative justice measures to the established criminal justice system, there are also some problems involved. Firstly, as has been argued under point 5.2.1, are the complications pertaining to the enforcement of measures aimed to restore community relationships. If imprisonment is used as the sword hanging over the offender's head, the sincerity of his or her cooperation may be questionable. In addition, the inability of poorer

offenders to make restitution payments creates a severe drawback to the application of this model. In summary, it may perhaps be asked whether the idea of restorative justice is not but another correctional trend that will come and go.

5.5.1.3 The risk-control model

Some of the advantages of a risk-control model are as follows:

1. As an intermediate sentence, this model provides an acceptable alternative to imprisonment in terms of the intensity and severity with which it is applied. It can thus both be seen as more safe and more punitive than routine probation.
2. A further advantage of this model, as explained, is its utilisation of “intermediate sanctions” in place of direct revocation to prison.
3. Advances in technology, especially on the terrain of Geographical Positioning Systems (GPS), may eventually revolutionise the field of automated risk control, especially if used in conjunction with computer analyses of risk assessment.
4. Discipline in itself may also have a rehabilitative effect, where the offender is forced to take responsibility for his or her life.

It holds the following disadvantages:

1. Such sentences often promise more than it can deliver. Because such a system is easy to “load” (in other words, because it is easy to pile extra conditions and measures onto a sentence in order to convince sentencing officials and the public that it is safe or severe enough), it holds the drawback that probation offices are unable to execute such sentences properly, leading to an actual loss of confidence among sentencers and members of the public.

2. ISP programs have not been able to reduce recidivism, except when certain treatment strategies were included.
3. This model is dependent, to a large extent, on the use of effective risk/needs screening techniques.
4. There remains a question regarding the incapacitating effect of community-based corrections when compared to incarceration.

5.5.1.4 The structured model

Although a pure structured approach to probation is just in the sense that offenders with similar crimes would be treated equally, and also holds the advantage that a straight message is sent to the public concerning the consequences of certain actions, it is the researcher's belief that such a system would actually be unfair because of its lack to properly consider the interests of society and of the offender.

It is possible to pose the question in this regard whether real justice would not mean more than mere uniformity (or proportionality) between sentences. It is the author's opinion that proportionality in probation should be reflected in the length of sentences and in the basic conditions, but that - in the best interests of the community - supervision and treatment should be based on the needs and risk classification of the offender.

5.5.2 Conclusions

When considering the various arguments and facts forwarded in this chapter, an ideal probation system should have the following characteristics:

1. Retribution, in the sense of proportionality between crime and punishment, should be the main criterion on which to base sentences of probation.

2. Mandatory sentencing guidelines are favoured as they remove possible bias in terms of improper factors from the sentencing scene. A further advantage, especially in a country such as South Africa where there is a strong bias in favour of imprisonment, is that the proportion of offenders that should be handled in the community could be regulated by legislation.
3. Regarding the duration of the sentence, time should be fixed in accordance with the guidelines system, so that offenders would know what to expect. Good conduct reductions can, however, be considered as an incentive for probationers in cases where no violations have occurred.
4. Apart from a sentencing grid system determining the type of sentence to be laid down and the duration of the sentence, it is the author's opinion that a risk/needs prediction instrument should be extensively used to facilitate decisions during the probation process.
5. Supervision should be determined by a model combining:
 - a) the seriousness category of the offender according to the offence and the previous convictions; and
 - b) the findings obtained in the risk/needs assessment.

This means that offenders in low-risk categories should receive supervision with a low intensity, whilst high-risk offenders would be strictly monitored and supervised.

6. It is the opinion of the researcher that electronic monitoring will probably become the predominant means of monitoring in future, following the upsurge in technological advances today. The development of cheaper, light weight batteries, in particular, will advance the use of GPS systems and other distance detecting devices in future that may lead to a transformation in the use of community-based sanctions.
7. Conditions should be used circumspectly to prevent "loading," and should be graded according to the risk/need analysis as described above.

8. Violation procedure, just as the other decision-making processes within the system, should be based on a structured basis, based on a graded scale. As with the risk-control model (see point 5.3), adaptable conditions and supervision, as well as the use of brief sessions of incarceration could be used to ameliorate the use of revocation.

CHAPTER 6: THE SOUTH AFRICAN SITUATION

Many characteristics of the international crisis in corrections are also visible in South Africa. A variety of political, economic, demographic, and perceptual factors have led to both a huge upsurge in the volume of crime in our country and the increasing inability of existing structures to handle the numbers. The situation here is comparable to a large extent to the situation in the United States and in many other countries characterised by high crime rates and the congestion of correctional facilities. The correctional system in South Africa is in some respects perhaps nearer to those in First World countries than to the rest of Africa, as the South African Department of Corrections is much more structured and organised than prison authorities in most other African countries.

In a media conference by Mr. Ben Skosana, Minister of Correctional Services, on 14 June 2000, prison overcrowding was described as the single biggest problem in South African prisons today (South Africa, Department of Correctional Services 2000:2). In South Africa management issues have been intensified by fundamental changes to the Department of Corrections taking place simultaneously with a great upsurge in prison figures. These changes, which are the result of a political shift from an Apartheid state ideology to a democratically-chosen state, led to fundamental changes such as the demilitarisation of the department, the emergence of trade unions for warders, affirmative action changes, and more emphasis on human rights issues.

6.1 THE CORRECTIONAL SCENE IN SOUTH AFRICA

It must be noticed that the management of prisons is not the only concern of the department, and that it also has the task of applying community corrections, in line with the Correctional

Services Act, No. 111 of 1998. According to this act, the stated purpose of the Department of Correctional Services is:

...to contribute to maintaining and protecting a just, peaceful and safe society by-

- (a) enforcing sentences of the courts in the manner prescribed by this Act;
- (b) detaining all prisoners in safe custody whilst ensuring their human dignity; and
- (c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections.

This statement can be seen to comprise three elements: 1) the safe custody of prisoners, 2) within a humane framework, 3) with an emphasis on the upliftment of offenders in prison and under community corrections.

6.1.1 Description

~~As~~ issues related to probation will receive more attention in point 6.2, the South African situation with regard to prisons can be summarised as follows:

Prison figures for January 2002 were as follows: Of the 177 701 prisoners in custody, 120 635 (or 67,9 per cent) were sentenced and 57 066 (or 32,1 per cent) unsentenced. These prisoners were detained in 236 prisons countrywide, of which eight were only for females, twelve were youth correctional facilities, 115 were only for males and 89 accommodated both males and females.

~~As~~ regards the custody of juveniles, 26 795 youths (under the age of 21 years) were held in correctional facilities of whom 14 130 (52,7 per cent) were unsentenced and 12 665 (47,3 per cent) sentenced. Of these 26 795 youths, only 472 (or 1,8 per cent) were female.

The separation of prisoners rests on the following principles:

- Sentenced prisoners must be separated from all categories of unsentenced prisoners (this implies keeping sentenced prisoners in different wards, and also keeping their movements apart from those of unsentenced convicts);
- Male prisoners must be separated from female prisoners; and
- Children must be kept separate from adult prisoners.

Prisoners in South African institutions are categorised according to a risk classification system. There are three classification groups: "Minimum," "medium" and "maximum."

According to the figure for 31 January 2002 (South Africa, Department of Correctional Services 2002), 22 per cent of prisoners were classified as requiring maximum incarceration, 63 per cent fell in the medium risk category, and 2 per cent fell in the minimum risk group. It is required that prisoners in different security risk categories be separated as far as is practically possible.

Apart from risk classification, prisoners are also separated into different privilege groups: A, B, C or D groups, with A-group prisoners receiving the most privileges and group D the least. In order for a prisoner to be declassified, factors such as behaviour and adaptation are considered.

6.1.2 The crisis in South African corrections

As pointed out, South Africa's prisons are bursting at the seams. Against the available accommodation figure of 106 090 on 31 January 2002, 177 701 people were actually incarcerated. This amounts to an overcrowding figure of approximately 160 per cent, meaning that on average 160 prisoners are kept in the space intended for every hundred. What complicates the matter, is that projective figures show that this trend is on the increase, at least for the foreseeable future. An alarming aspect is that the rise in prison numbers

predominantly takes place in the aggressive and sexually related categories, which is more difficult to replace with alternative dispositions.

According to the Annual Report of the Department of Correctional Services (1999), overcrowding does not only affect the living condition of prisoners negatively, but also places a heavy burden on services like ablution facilities, kitchens, hospital sections, hot water sections and laundries. It also negatively effects supervision and control functions and threatens the standard of security in prisons (South Africa. Department of Correctional Services 1999).

Other consequences of overcrowding are:

- Lack of sleeping facilities.
- Insufficient water and sewerage systems.
- Overloading of electricity supplies.
- Unhygienic infrastructural problems.
- Lack of privacy (especially for those prisoners who want to study).
- Improper separation of risk groups and age categories.
- The transfer of prisoners to address overcrowding problems leads to loss of contact with families.
- Victimisation of and conflict among officials (South Africa. Department of Correctional Services 2000).

Although the Department of Corrections is making extensive use of measures such as “bursting,” prison privatisation, electronic monitoring, and the placement of presentenced offenders on probation as a release mechanism, prison population figures are still disturbingly high. More extensive use of probation can make an important contribution in this regard by alleviating the burden on prisons.

6.1.3 External factors shaping South African corrections

In an attempt to explain the overcrowding of prisons, the researcher shall look under this point at some of the external factors that exert an influence on the growth in prison numbers.

6.1.3.1 Political factors

The political picture in South Africa has, for the last decade or so, been dominated by the transformation from an "apartheid" state to a more representative democracy. Apart from huge political changes - away from the legacy of apartheid to a vision of democracy, equality, and justice for all - the criminal justice system itself has experienced fundamental changes. Whilst criminal justice before 1994 had in part been an instrument used by the government of the day to enforce the system of apartheid, its mission has now changed into that of a mechanism for the fight against crime.

A further result of the political changes political issue that affects the correctional scene today is the Constitution of the Republic of South Africa, which has brought this country more in line with international trends, especially pertaining to the protection of fundamental human rights and the maintenance of democratic values. This has led, for instance, to the abandonment of capital punishment and corporal punishment as penalties and also to numerous changes in legislation that brings correctional practices more in harmony with internationally acceptable practices and standards.

One of the critical issues facing South Africa currently is the crime problem, which not only exerts a negative influence in the lives of South Africans, but also severely affects the economy of the country by scaring off potential investors.

Fortunately, for state institutions such as corrections, the new government has brought with it a fresh approach to many of the practices and ideas that were sometimes taken for granted under the old dispensation. Since the historical elections of 1994, there has been a willingness to critically look at the meaning of structures and to consider new ways of dealing with issues such as the crime problem.

6.1.3.2 Economic factors

There are mainly two economic characteristics in South Africa that effect the crime situation. The first is the problem of poverty that is characteristic of many Third-World countries where abject poverty and unemployment under certain segments of the population lead to feelings of hopelessness and contribute towards crime.

The second feature is economic stratification that, similarly to the situation in the USA and to a growing extent in European countries, brings about perceptions of "relative poverty" where some segments of the population observe the material wealth of others without having the means to obtain it in legitimate ways. This also leads to a proliferation of crime.

6.1.3.3 Public opinions

Public opinions in South Africa with regard to crime and punishment is largely in line with tendencies in the rest of the world. This is not really surprising since Durham (1993:3) mentions that comparative studies show a considerable degree of cross-national agreement concerning the relative seriousness of a wide variety of offences (Durham 1993:3). Although studies on public punitiveness in South Africa are relatively scarce, two opinion surveys may be mentioned.

In a 1999 survey by Schönteich of 470 respondents in the Eastern Cape, the punitive levels of the public can be seen in the following figures (Schönteich 2000):

- 71 per cent of respondents felt that the prison should be harder on prisoners.
- Less than half thought that being put in prisons really punishes offenders.
- Most respondents thought that the sentences handed down by the courts were either "much too lenient" (58 per cent) or "slightly too lenient" (27 per cent).
- 90 per cent of respondents who felt that sentences were too lenient thought that lenient sentences had played a major role in the increase in crime since 1994.
- 51 per cent of respondents thought that corporal punishment for juveniles should be reintroduced as a punishment.
- 58 per cent disagreed with the statement that "the government has done a good job on fighting crime and lawlessness."

These findings show high punitiveness levels amongst respondents, general dissatisfaction with the performance of the state in applying justice, and also demands for even stricter measures against criminal offenders.

In a study by Oliver (1999) in Mankweng, Northern Province, where public punitiveness and opinions about just deserts were tested, the same tendencies were detected, although respondents were perhaps even more punitive:

- 84 per cent strongly agreed with a statement that sentences handed down by courts were too lenient.
- 76 per cent agreed or strongly agreed with a statement that the death sentence should be reintroduced.

- 91 per cent agreed that all rapists should be put in prison for 20 years.

Although it is impossible to determine punitiveness levels from responses to single statements such as these, the responses are still an indication of the public's indignation about crime and their insistence that "something be done about the crime problem."

6.1.3.4 Sentencing trends

Concerning the purposes underlying punishment, the South African system is based on a so-called "unitary theory" of punishment. According to Snyman (1991:23): "The courts do not reject any one of the theories outright but, on the other hand, they do not accept any single theory as being the only correct one to the exclusion of all the others." This is evident from the verdict delivered in the Appellate Division by Davis A.J.A.: "...that the main purposes [of punishment] are reformation of the offender and the deterrence of him and others, with the ultimate aim of protecting society and diminishing the incidence of crime." (R v Swanepoel, 1945 SA 444 AD). South Africa has never, as in the United States, moved predominantly in a single direction regarding sentencing, but attempts to accommodate all motives of punishment, in order to be able to fit the sentence to all the parties concerned, as evident in the words of Judge Rumpff: "What has to be considered is the triad consisting of the crime, the offender and the interests of society." (S v Zinn, 1969(2) SA 537 (AD)).

Even though, as was mentioned in the previous paragraph, our sentencing philosophy retains a unitary approach, a number of practices, subjacent to the rehabilitation model, were inherited from other Western systems and gradually introduced into our sentencing and correctional system:

- The parole system;
- Individualised sentencing;

- Convincing the public that prisons are places where rehabilitation takes place and appointing psychologists and social workers to bring about this reformation (even if they are few, due to economic restraints); and
- Coupling prisoners' parole dates to their supposed co-operation with regard to "rehabilitation programs."

By adapting a multi-motive approach, sentences in South African courts may even be more disparate than would have been the case had they focused on a single one. The problem with this approach, although it is meant to counteract the shortcomings of utilising any one approach, is that it gives leeway for individual judicial officers to base their sentencing on opposing preconceptions regarding punishment, which can lead to widely different sentences being laid down for similar crimes. The problem may be stated as follows (Oliver 1998a:90):

There may be two sentencing officials, one a strict retributivist, able to properly motivate a sentence of seven years imprisonment for a rapist on the grounds that such a sentence reflects the community's indignation with acts of such a kind. Another sentencing official may motivate, with equal conviction, a sentence of correctional supervision along with psychological treatment for a similar offence. This does not necessarily suggest purposive prejudice on the side of any one sentencer, but the question has to be asked whether a system that allows such idiosyncrasies can be seen as just.

To be fair towards the system, there are limitations in place in our system, and it should not be thought that sentencers have boundless discretion with regard to sentencing. Some of the mechanisms that regulate discretion are: the legislative framework; principles developed by the courts; and control exercised by the courts of appeal or review (South African Law Commission on Sentencing 1997:2.26). This does not, however, take away the fact that there are a number of factors that encourage disparate sentencing:

- In the first place, sentences may not only vary with regard to one specific punishment (such as different lengths of imprisonment), but also between different types of punishment¹.
- The legal test applied by the courts of appeal in determining when it is appropriate to interfere with trial courts' decisions are, for example, if the sentence "induces a sense of shock," when the sentence is "startlingly inappropriate," or if it reveals a "striking disparity" compared to the sentence which the court of appeal would have imposed as court of first instance (South African Law Commission on Sentencing 1997:2.27). The vagueness and subjectiveness of such yardsticks are evident.
- The unitary theory, as was stated, lends itself to widely different interpretations, depending on the personal inclinations of the sentencer.

Taking these facts into consideration, it can be argued that the South African system lends itself to sentencing disparity, although the extent may vary. To complicate the matter the Department of Justice does not keep any statistics on sentencing, which makes the sentencing system immune to criticism for all practical purposes. Apart from the fact that this practice makes it almost impossible to assess sentencing trends, the potential for discriminatory practices based on variables such as race, gender, socio-economic status, political affiliation, etc. is evident.

Another factor that contributes towards the overloading of prison facilities is the recent introduction of mandatory minimum sentences, in accordance with the Criminal Law Amendment Act (no. 105 of 1997), where severe penalties are prescribed for certain

¹ According to Krügel & Terblanche Correctional Supervision could, for example, be laid down for any crime (1991:1004).

categories of crime, for instance: minimums of life sentence for Murder I and Rape I, and 15 years minimum for Murder II, Robbery II and Fraud II. These measures will certainly contribute toward overcrowding since the sentencer's discretion to take mitigating factors into consideration are seriously curtailed.

6.2 THE SITUATION REGARDING PROBATION

Point 6.2 will focus on probation. It is necessary to briefly mention the use of the term probation in South Africa: Before 1991, probation services were available under the Criminal Procedure Act, 51 of 1977, the Child Care Act (74 of 1983), and the Probation Act (98 of 1986). It basically consisted of the court sentencing someone to be placed under the supervision of a probation officer (who was often a social worker). This option was not often used until 1991, when the use of probation was extended and placed under the directive of the Department of Correctional Services. The term used to denote probation under this system was then "correctional supervision." Today, the term "community corrections" is used to refer to the application of probation and parole together, and the term correctional supervision has been changed back to probation.

6.2.1 The introduction of probation

In the address of the Acting Commissioner of Correctional Services on occasion of the opening of a community corrections office at Soshanguve on 8 June 2001, the initial stages of Correctional Supervision in South Africa as were described as follows:

In the early nineties a South African delegation visited several countries to research systems of correctional supervision that were practiced by them at that time. The system that was applied in Georgia in the United States of America was found to be possibly the best suited for South African circumstances. This led to the establishment of a multidisciplinary task team with the terms of reference to formulate a South African model of correctional supervision, based on the Georgia experience, and to

draft legislation that would meet the South African needs and realities. On 15 August 1991 correctional supervision was introduced in the magisterial districts of Pretoria and Wonderboom. This provided law courts with a sentencing option aimed at perpetrators of less serious crimes as an alternative to imprisonment. During 1992 implementation at other magisterial districts started until eventually it was an available alternative sentencing option in all magisterial districts.

6.2.2 A description of probation in South Africa

Probation in this country differs from routine probation as traditionally applied in other countries. The Georgia Intensive Probation Supervision program, from which the local version was derived has the strictest form of intensive probation in the United States (Bartollas & Conrad 1992:238). The emphasis in the Georgia system of Intensive Probation Supervision is not so much on service provision and rehabilitation, but on control (Lawrence 1991:454).

The probation system used in South African can therefore not be seen as routine probation, which is mainly based on a rehabilitation viewpoint, but as an ISP program. Apart from more intensive supervision, probation in South Africa normally contains the following conditions that make it a more intensive sentence:

- House arrest.
- Community service.
- The compulsory attendance of rehabilitative programs.

Other conditions such as child maintenance payment, victim remuneration, and ordering the offender to look for employment, can also be included by sentencing officials.

Another unique feature of correctional supervision lies in the “degrees of probation” (minimum-, medium- and maximum supervision) that determine the level of supervision and the amount of freedom that the probationer enjoys. Under maximum supervision, for instance,

it is required of the probationer to remain under house arrest during all non-working hours, and he is visited at home at least twice a week. Depending on his co-operation, these conditions may be gradually relaxed so that more free time becomes available and he is monitored less often (only once per month under minimum supervision).

6.2.3 The underutilisation of probation

In the introduction to this study part of the rationale was the idea that probation is an underutilised sentencing option. This is a vital assumption, since the gist of this study is that imprisonment should, to a much larger extent, be replaced by probation. Point 6.2.3 will look at what this means and to what extent probation can be seen as an underutilised sentence. It will also provide some reasons for the underutilisation of probation: The problem of perceptions (point 6.2.3.2), and the problem of application (point 6.2.3.3).

6.2.3.1 What is meant by the underutilisation of probation in South Africa?

In view of the prison overcrowding problem as well as the serious shortcomings of imprisonment as mentioned in chapter 3, it is obvious that South Africa is in need of a feasible alternative to imprisonment. There are basically two ways of looking at the underutilisation of probation:

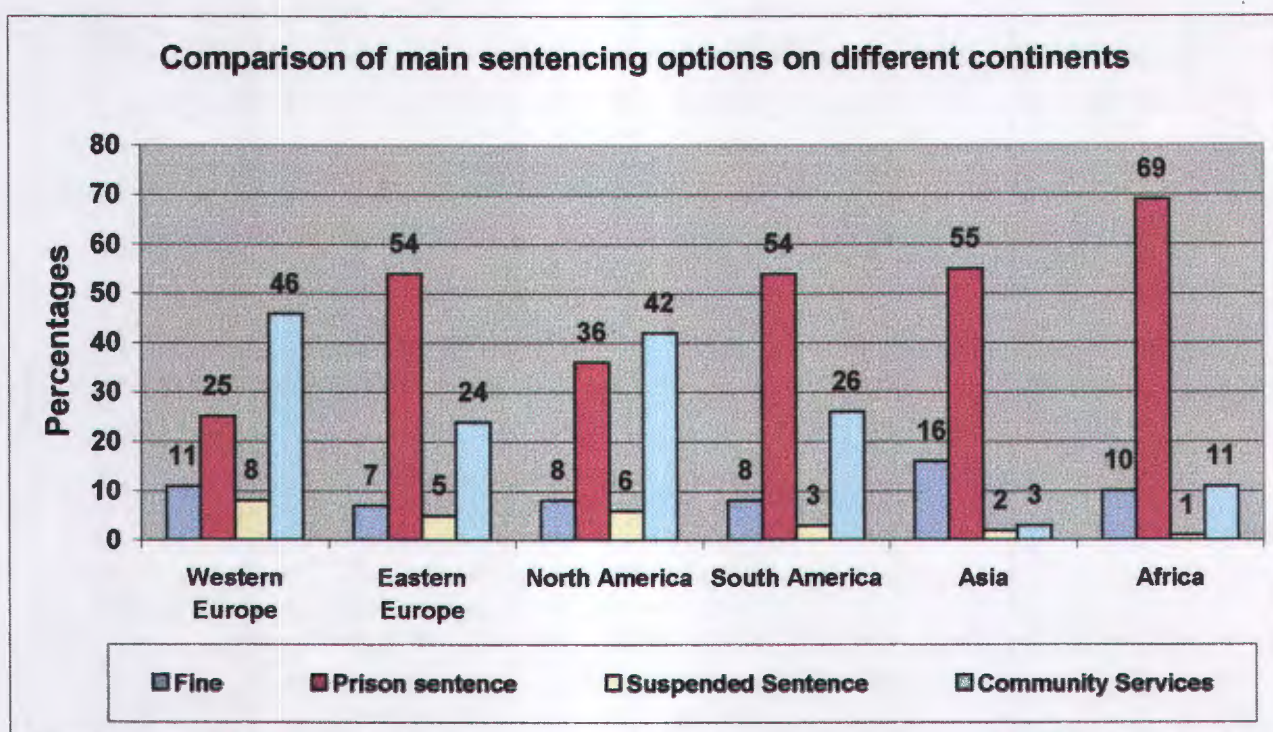
1. In an absolute sense, by referring to the numbers involved, and
2. relative - in relation to the numbers of prisoners that it is safe to handle in the community.

In an absolute sense, statistics provided in the 1999 Annual Report of the Department of Correctional Services show that the daily average of probationers were 12 648 against a

daily average of 104 407 sentenced prisoners¹ - which means that the Department handles about nine times as many sentenced prisoners as probationers.

If this figure is compared to the use of the main sentencing options in different continents (Albrecht 1998:62), the underutilisation of probation is obvious:

CHART 6-1: COMPARISON OF MAIN SENTENCING OPTIONS IN DIFFERENT CONTINENTS



(Source: Albrecht, H.J. 1998. Modern Trends in Criminal Corrections and Prison Systems in Europe, p.62)

¹ A figure of 34 845 probationers at the end of April 2002 was obtained (Hlongwane 2002) which is much higher than the 12 648 quoted here, but this includes a large percentage of presentenced offenders that are supervised by probation personnel. The number of sentenced offenders on probation is unfortunately not recorded, but the researcher suspects that it would not be a much higher percentage (in relation to those in prison) than the figures for 31 December 1999.

When compared to these figures, the use of probation as a sentencing option in South Africa is fairly similar with the rest of Africa (11 percent). It is, however, much lower than its average use in Western Europe (46 per cent), Eastern Europe (24 per cent), South America (26 per cent), and especially North America (42 per cent).

When seen in conjunction of the fact that South Africa has, according to statistics, the fourth highest prison rate in the world (see chapter 1), the need for an increase in the use of probation is apparent. The sentencing situation in South Africa is also complicated by the fact that, in contrast to some European countries where fines can readily be used as a non-custodial alternative to incarceration, offenders in South Africa often emanate from the poorer strata of society which makes the collection of fines problematic - especially when it is also considered that the result of non-payment is usually imprisonment.

The underutilisation of probation is a more complex issue. It depends on the degree to which prisoners (or potential prisoners) can be released into the community without unduly endangering it. At this moment, the extent to which this is possible in the South African context is unknown, and would depend - in practice - on a mixture of research and a system of trial and error. If this sounds too risky, it should just be kept in mind that::

1. Almost all prisoners are eventually released back into society, including those who would never be considered for probation.
2. The number of more serious offenders in the community on parole or as the result of early release mechanisms is already large.
3. Imprisonment has not been shown to reduce recidivism, which makes many of these offenders even more of a risk than they were before going to prison.

It is therefore one of the recommendations in this study that serious attempts should be made to develop a reliable risk/needs instrument for use in South Africa. The system of probation

proposed in this study (see chapter 8) also attempts to build in a safety mechanism whereby the probation sentences of high-risk offenders would be easier to revoke than that of low-risk probationers.

In terms of the reasons why probation is an underutilised sentence, some of the issues will be discussed in the following two points.

6.2.3.2 A problem of perceptions

The first reason for the underutilisation of probation has to do with the misconception among sentencing officials that no punishment is serious unless it involves imprisonment (Tonry & Morris 1990). This can be related to resistance against any new idea that threaten their personal beliefs and their discretion to lay down sentences of imprisonment.

The attitudes of judicial officers in South Africa can be seen in the relatively low number of offenders that are sentenced to probation. Their reasons for doing so are probably a mixture of custom and perceptions of probation as a “soft” option.

A third reason for the underutilisation of probation has to do with judicial officers’ opinion that sentencing is a lofty function that should function above trivia such as whether there is enough space in prisons to handle the numbers. This is clearly evident in a finding by Schönteich, Mistry and Struwig (2001:8) that the judiciary officers in their survey were almost unanimous in their view that the capacity of the correctional system to carry out sentences should not be considered when sentencing accused persons.

A fourth reason may be a vagueness in prescriptions about the use of probation. Even statements by the Minister of Correctional Services differ with regard to the question whether

this sentence is to be reserved for first-time and non-serious offenders, and whether it could also be used for other categories of offenders.

6.2.3.3 A problem of application

Apart from mistaken perceptions, a major reason for the underutilisation of probation lies in its defective application. Even magistrates and judges that are in favour of probation have had the experience that the conditions they had laid down were not properly carried out by probation officers. This causes judicial officers to think twice about using probation as an option.

One of the main problems with correctional supervision is that a system was adopted which is actually an intermediate sanction (the Georgia ISP program). As discussed in chapter 4, ISP programs were created with the express purpose of replacing imprisonment as the customary sentence for most non-violent offenders. In a seeming attempt to convince the judiciary and the public that correctional supervision would be safe and punitive enough, the South African correctional authorities “loaded” it with measures that are often unsustainable in practice. The problem of the loading of probation is described by Lawrence (1991:454): “We too often threaten what we cannot deliver. We cannot adequately monitor probation rules for all persons in impossibly large caseloads nor can we provide the community protection which is implicitly promised. Our clients have long known that these are empty threats. The public [in turn] has become more aware that some probationers continue to commit crimes, and have begun demanding tougher sanctions than probation.”

This is precisely what happened in South Africa. By being overly zealous, the Department of Corrections failed to take two important aspects into consideration:

1. The degree of punitiveness: Although the Department of Corrections envisaged probation to be punitive, it did not distinguish between those offenders who were real candidates for IPS and those who had committed minor offences. The result was that offenders who pose little or no threat to society are treated in the same way as those requiring strict surveillance and conditions. Part of this problem is the fact that South Africa does not have the same kind of routine probation that exists in the United States.
2. An insufficient investment in staff: Conrad (1985:416) remarks that: "Anyone who has ever been employed in correctional field services will immediately recognize that ... it has to be matched by a realistic investment in trained and conscientious staff." Probation officers in South Africa were transferred from prisons without being informed precisely how to handle the particulars and, even more importantly, what the reasons are for doing things in a particular way. The differences between the American and South African situations are also evident in that, in the Georgia system, candidates who had years of experience handling ordinary probation were selected and received intensive and continuous training to equip them with the necessary skills (Conrad 1985:418).

The result of this inappropriate use of probation has led to a situation where probation has a poor image among sentencing officials and the public alike.

6.3 CONCLUSIONS

In comparison with correctional systems in most other countries, South African corrections has a tremendous task ahead which is aggravated by a steady inflow of convicted criminals into prison, and the huge amounts of money that is needed to accommodate them. In terms of the country as a whole, capital spent on prisons could, ironically, be much better used for

younger people, but that those with higher qualifications or a higher family income are less punitive than those with lower qualifications or from poorer families.

Pertaining to the Just Deserts scale, significant correlation between qualification-level and punitiveness and household income and punitiveness were also established, but with the difference that these correlations were positive, indicating that people with higher qualifications and from richer families tend to support longer terms of imprisonment than their opposites. In this case, no correlation could be established between punitiveness and age, gender and victim status.

These findings confirm, to a certain extent, the findings of the previous point on the absence of a relationship between the Likert scale and the Just Deserts scale by showing that respondents who have higher educational levels and higher socio-economic status score, in turn, lower on the Likert scale but higher on the Just Deserts scale.

6.5.2.5 Findings on responses to open-ended questions

Open-ended questions were categorised in terms of 18 points: 11 of them representing punitive reactions and 7 non-punitive reactions. These 11 punitive and 7 non-punitive reactions were, in turn, grouped into 4 headings, those having to do with respectively the crime, the criminal, the victim and punishment.

Findings with regard to individual crime descriptions showed much variety depending on the individual traits of the description. With regard to all seven descriptions together, however, the following deductions can be made:

- That a high level of punitiveness of respondents is evident, not only from the sentences that were prescribed, but also in the number of times respondents reacted punitively versus non-punitively toward crime descriptions.
- That, as to the motives of punishment, respondents' responses reflected retribution as motive in nearly 90 per cent of instances.
- That respondents show an inherent respect for the law in terms of its image and reacted strongly toward offenders whose actions damage this image.
- A fourth interesting deduction is that some respondents view adultery as a crime, and some even viewed an invitation to a fight as a matter to report to the police.
- Family structures seems to be quite important to respondents. They seem to have strong ideas about the roles to be played by the husband and the wife, and some even justified murder as a suitable reaction toward adultery. In the case of the mother who assaulted her children, there was also some support for a view that punishment should be ignored so that the mother could remain to look after her children.
- Pertaining to woman's rights, an interesting finding was that respondents reacted much more punitively toward the man who offered a woman a job on condition that she first had sex with him, than to the man who assaulted his wife. In the last instance, the assault was justified on the grounds that he had a right to do so since she was lazy and failed to clean and cook.

6.5.3 HSL, LSL, HSJ and LSJ in terms of the demographic variables

Gender does not seem to be a relevant factor with regard to the differences between HSL and LSL. In terms of the relationship between HSJ and gender, however, more men are represented in HSJ.

In terms of age, HSL fall mostly in the higher age groups and LSL in the younger age groups. HSJ and LSJ, however, presents a more complex picture where both more younger and older people (that the total sample) score both high and low on the Just Deserts scale. This means that those people who are most punitive (or non-punitive) in terms of the Just Deserts scale come from the younger and older groups while people who react more moderately fall in the middle age groups.

A comparison between qualifications and these groups showed that HSL had lower qualifications than the total sample, whilst LSL's qualification levels were higher. In the case of HSJ and LSJ, we get an almost opposite trend, with the qualification levels of HSJ more than the total sample and LSJ less.

As for family income, HSL earned somewhat less than the average income for the total sample whilst LSL earned somewhat more. Again, this trend was opposite in terms of HSJ and LSJ, where HSJ earned more than the average while LSJ earned the least of all groups.

Concerning victim status, no meaningful relationship in terms of the differences between these groups and victim status could be established.

The first five points, pertaining to the discussion thereof in this study, will be summarised and placed into perspective, to serve as a backdrop for the proposed quantified model of probation in chapter 8. The following headings will be used:

- The crisis in corrections.
- What is required of a feasible alternative to incarceration.
- Probation as a viable alternative to imprisonment.
- The limitations of probation.
- Putting what has been learned into practice - elements of a more just probation system.

7.1 THE CRISIS IN CORRECTIONS

It has been shown in this study that the current situation in corrections (in many countries all over the world) can be described in terms of a crisis situation, referring mainly to the congestion of prison facilities and the negative consequences thereof. It has also been argued that there are some deeper-lying problems in corrections that facilitates this crisis and adds to its negative consequences.

This underlying problem essentially has to do with the failure of imprisonment as a sentencing option; firstly in its inability to stop people from committing crime, but even more importantly, with regard to its unintended consequences. These unintended consequences refer to aspects such as its brutalising effect on inmates, health risks, its long-term impact on the offender, its effect on the families of prisoners, and its uneven descent on the poor and disadvantaged in the community. Apart from the fact that these factors often intensify the overcrowding problem and creates a snowball effect, questions can also be asked about the justness of sending people to prison where these dangers are known to exist. From a

retributive standpoint the problem can be stated as follows: "A person commits a crime for which he deserves to be punished. Apart from the time served in prison (which is the punitive objective of imprisonment), this type of punishment often has other wide-ranging effects that can far outweigh the severity of the punishment itself, which makes the sentence unjust."

These problems with imprisonment are not one of corrections alone, but should also be seen in a wider sense. Sentencing trends, in particular, exert a major influence on the way in which corrections is shaped. Sentencing not only determines the number of offenders flowing into the system and the duration of their sentences, but also the forms of punishment that are handed down (see point 3.2.1). The crucial role of sentencing philosophies, in particular, has been emphasised by Blumstein & Beck (1999), who calculated that only 12 per cent of the increase in the national prison population in the United States (that tripled in size between 1980 and 1996) can be attributed to changes in crime rates, whilst as much as 88 per cent can directly or indirectly be ascribed to the "tough on crime" stance that is currently prominent in the USA. In view of this factor, it is obvious that the problem touched on in this study, which is to revise the system of probation in South Africa, does not lie on the terrain of effectiveness alone, but is also a problem of perceptions.

It is apparent that there is an urgent need for workable alternatives to imprisonment. In the next point, the requirements of a viable alternative to imprisonment will be examined.

7.2 WHAT IS REQUIRED OF A VIABLE ALTERNATIVE TO IMPRISONMENT?

An issue that was not specifically dealt with in this study is the question of what a viable alternative to imprisonment should look like. This is important since the effectiveness of probation as a sanction should be measurable.

Three categories of requisites can be distinguished in this regard:

- Structural requirements.
- Utilitarian requirements.
- Justice or fairness requirements.

7.2.1 Structural requirements of alternatives to imprisonment

The main restriction in finding a suitable substitute for incarceration has to do with the limited range of available sentencing options, and the role played by imprisonment as the severest sanction available. Any alternative penalty must subsequently approximate imprisonment in terms of severity, if it is to be of any use in ensuring the public and sentencing officials that justice is being done. This was one of the main considerations for the development of Intensive Supervision Probation in the early 1980's (see point 4.2.3.2).

To complicate the matter, it must also be remembered that imprisonment (as the severest penal sanction available) will still be required to act as the proverbial "sword of Damocles" that hangs over the offender's head in case he or she fails to comply with the conditions of a noncustodial penalty. The result is that imprisonment is not totally replaceable within the current range of sentencing options, and that the purpose of alternative sanctions is consequently not to remove all offenders from prison, but rather to reroute as many as possible to the community.

7.2.2 Utilitarian requirements of alternatives to imprisonment

A second category of requirements is in terms of the purposive motives of punishment, namely specific deterrence, general deterrence, rehabilitation, and incapacitation. Each of these motives will be briefly discussed:

7.2.2.1 Specific deterrence

Deterrence of the offender was one of the main reasons behind the use of imprisonment as conceived by Jeremy Bentham. The idea of using punishment to deter prisoners was, and still is, one of the main aims of incarceration. The question of “what works?” that is often asked in correctional literature, also has to do with this motive. In a practical sense, what is required of any penal sanction is that it curbs recidivism, or re-offending, after the prisoner has been released. It can also be seen in connection with crime prevention, where specific deterrence can be described as “secondary” crime prevention (preventing further crime from happening) to distinguish it from primary crime prevention (preventing crime before it happens).

7.2.2.2 General deterrence

A second practical mission of correctional measures is to deter potential offenders from committing crime. The basic idea (especially in terms of imprisonment) is that punishment should be seen by the public as so terrifying that people would refrain from committing crime. To what extent this mission is possible in a more humane setting (such as probation) is debatable, but it could be that imprisonment itself has a limited ability to deter generally, as shown by research (see point 3.3.1.3).

7.2.2.3 Rehabilitation

A third requirement of an effective alternative to imprisonment is that it should be able to rehabilitate people. This goal is actually closely related to specific deterrence, because its main mission is also to prevent people from re-offending. Rehabilitation, nonetheless, has a broader aim, because it does not concentrate solely on frightening the offender, but rather on changing those aspects of offenders that can be changed and are associated with criminal behaviour (to change the individual into a law-abiding citizen, in other words).

7.2.2.4 Incapacitation

A further qualification for a feasible alternative to incarceration is that such a sentence would have to have some incapacitating value in protecting the community from dangerous offenders. One of the strongest arguments for the use of imprisonment is that it is effective in removing offenders' capacity to commit crime, at least for as long as they are detained. Physical isolation is obviously not the only way to incapacitate, and a person can also be incapacitated by strict surveillance or even by means of rehabilitation where the criminal propensities of an offender are diminished.

7.2.3 Justice

The last requirement is that justice - in the sense of fairness towards all parties - should be a central tenet of any alternative measure. As discussed in chapter 2, justice in the criminal justice context contains the following core elements:

1. The use of punishment, where punishment (in the sense of some kind of unpleasantness) should be seen as one of the fundamental cornerstones on which a philosophy of justice is built.
2. An indeterministic viewpoint of responsibility, in terms of which people can normally be seen as rational beings who deserve to be punished in accordance with their choices.
3. Closely related to this, the element of culpability, according to which the offender deserves punishment because he or she wilfully did something wrong or neglected to do something that is reasonably required.
4. The element of proportionality of punishment to crime, in terms of which the punishment should equal the crime. Another way of looking at this would be to say that

the state's powers to intervene into the life of one of its citizens should be limited to the extent that his or her crime warrants.

As discussed in point 5.2, a more comprehensive form of justice is also demanded by the restorative justice movement, which is getting increasing attention today. From their viewpoint, the emphasis of justice should shift from punishing the offender to restoring the damage created by the crime, and by restoring those who have suffered damage, especially the victim and his or her family. The neo-utilitarian punishment model, on the other hand, places the emphasis on the interests of the community, and sees justice primarily in terms of the state's obligation to protect its citizens from dangerous people.

As the researcher attempted to show in chapter 2, basic justice - although it may not always makes sense from a utilitarian viewpoint, should be a central part of any sentencing decision because people will not indefinitely stand for it if it is not considered to be fair, and also because an exclusive emphasis on the utilitarian purposes could easily lead to malpractices.

7.3 PROBATION AS AN ALTERNATIVE TO IMPRISONMENT

The next important matter is to consider probation as a feasible alternative to imprisonment. Although most of the aspects here were mentioned in chapters 3 and 4, this point will specifically try to assess the value of probation by comparing it to imprisonment.

Though it can be argued that imprisonment has been a failure in terms of its intended and unintended consequences, and is unjust and unethical (see point 3.4), there still remains a heavy responsibility on the shoulders of the state to protect its citizens from dangerous individuals. In view of the limited range of available correctional options, and the seriousness of crimes committed, imprisonment is sometimes the only suitable option available for sentencers. Apart from the necessity of protecting society, however, imprisonment is often

used because it is a popular way of applying punishment. Reasons for the popularity of the prison among both prison administrators and the public are:

1. That there are currently no penal measures perceived to be severe enough to take its place. Penalties such as exile, corporal punishment, or the castration of sex offenders are sometimes mentioned by the public, but the fact of the matter is that penalties comparable in weight are either not practical or are out of line with the humanistic "zeitgeist." An equally important reason for its continuation is that nearly all current alternatives to incarceration, such as fines, probation, community service, restitution etc. are dependent on the threat of imprisonment to enforce their conditions.
2. It is the contention of the writer that - to a large extent - incarceration is popular because it works well from a management perspective. The administration of prisons is relatively uncomplicated (in the sense of keeping prisoners inside), at least as long as the basic prescriptions are adhered to. Under the rehabilitation model, prisons also worked well because decisions made by sentencing officials, prison authorities, and the parole board were almost impossible to criticise, and even appellate courts were hesitant to interfere in the routine decisions of these bodies. By employing treatment personnel and having some kind of treatment strategy going (whether in the forms of literacy classes, teaching offenders to weld, having a social worker around to help trace family members, or having some kind of group discussions as pre-release treatment), prison administrators could claim that prisoners are being rehabilitated. The traditional allocation of supervision and treatment to disciplinary and treatment personnel respectively also sees to it that the system works well in practice and that, except for the fact that rehabilitation did not realise, its basic functions of safe custody and punishment are effectively carried out.
3. Although it has been determined that imprisonment as the venue for the application of treatment has not been very successful, does not seem to deter potential offenders,

and does not stop those who are released from returning to it - it has one distinct advantage: it effectively prevents inmates from harming people outside, at least during their stay in prison (Von Hirsch 1976:20, Murphy 1991:128).

4. Another way in which incarceration has proved to be popular lies, quite ironically, on the terrain of meting out punishment, and what can even be referred to as public vengeance (even though the public often insists that conditions inside prisons should be made even severer).
5. Closely related to the idea that imprisonment exacts "justice" is society's belief in the preservation of the prison (Bartollas & Conrad 1992:4, Cowley 1998:39). Studies on public punitiveness have shown that members of the public normally equates punishment with imprisonment.

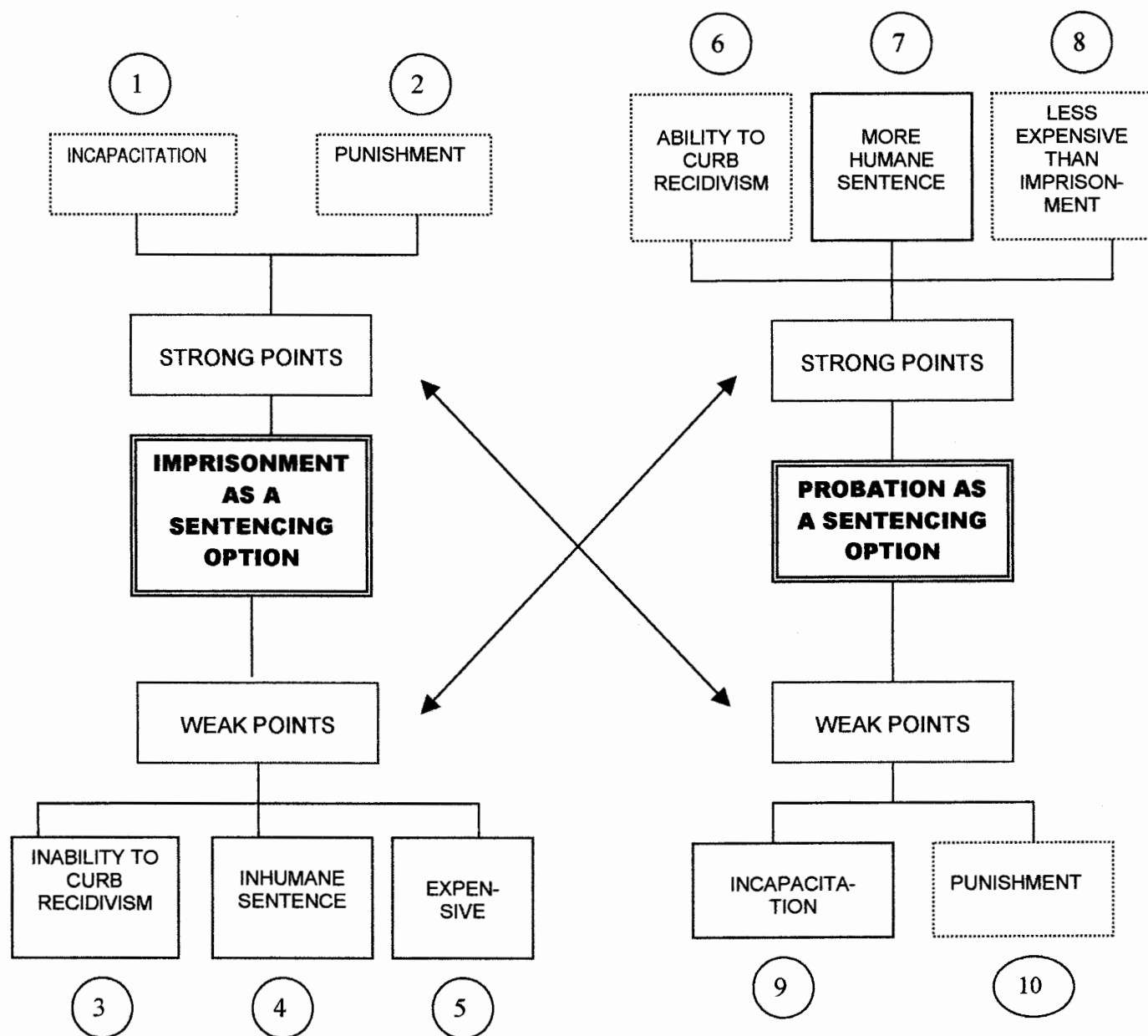
When one looks at probation, on the other hand, an important advantage lies in its flexible nature. It is this element of flexibility, to a large extent, that makes it a suitable option to replace imprisonment for a large percentage of offenders. In the case of ISP programs, the adaptability of probation was used to increase its control and punitive capacities, in particular. In practice, probation is also largely adaptable to the needs of the criminal justice system and can be used in a huge variety of ways. Examples are its use as a direct sentence ("front door" sentence), as an early release mechanism ("back door" sentence), in lieu of imprisonment for bail or fine defaulters, as part of a split sentence, etc. The flexibility of probation is especially important in a system where imprisonment still remains the predominant means of applying punishment as probation can be used to devise sanctions around it.

Perhaps the most compelling reason for the use of probation has to do with the principles of the reintegration model (see point 4.2). This model is based on the idea that recidivism would be prevented more effectively if offenders are returned to society (reintegrated in the community) as law-abiding citizens. It is argued that, as nearly all prisoners would eventually

return to their communities, they should be helped to deal with the problems of adapting to community life sooner rather than later. This should be done instead of subjecting them to the abnormal environment of the prison that often leads to higher levels of criminality and a smaller chance of being rehabilitated. The main advantage of this philosophy over imprisonment has to do with the issue of responsibility. Whereas imprisonment strips the offender from almost all autonomy (which practically places him in the helpless position of a child), re-integration constantly focuses on the offender taking responsibility for his or own live, which makes (or can potentially make) a positive prognosis with regard to rehabilitation possible.

To help explain the differences between probation and imprisonment, diagram 7-1 demonstrates some of their comparative strong and weak points:

DIAGRAM 7-1: ASSESSMENT OF STRONG POINTS AND WEAK POINTS OF PROBATION IN RELATION TO IMPRISONMENT



LEGEND:

- Strong point
 Fairly strong point
 — Weak point
 Fairly weak point

This diagram is based on a comparison between the perceived advantages and disadvantages of imprisonment and probation respectively. As is shown in the diagram, there seems to be an inverse relationship between the strong and weak points of imprisonment and probation respectively, as the strong points of imprisonment can be seen as the weak points of probation, and *vice versa*. Referring to the numbers presented in the diagram, each point will subsequently be discussed briefly:

Incapacitating effects (points 1 and 9): The ability of probation to incapacitate offenders is inherently much inferior to that of imprisonment as offenders stay in the community. Some comments, though, can be made in this regard:

1. It can be argued that almost all prisoners are eventually released and, if they are not properly rehabilitated, may present an even bigger threat to the community than before.
2. Emergency release mechanisms, as used in countries with seriously overcrowded prisons, cause the average time spent in prison to decrease, cancelling the incapacitative effect of imprisonment.
3. ISP programs can ensure a fairly high degree of protection for the community, depending on factors such as:
 - The use of risk-prediction instruments.
 - The intensity of supervision and the measures used to ensure compliance (such as electronic monitoring).
 - Revocation procedures, and the celerity with which non-compliance issues are addressed.

Increased surveillance and the use of risk-prediction instruments and electronic monitoring add to the cost of supervision. In addition, revocation procedures that are too strict may cause

a large percentage of probationers to be returned to prison, which defies its basic mission (which is to keep offenders out of prison). These factors consequently have to be weighed up against each other to decide on a preferable sanction.

Punitive aspects (points 2 and 10): On an eye level, incarceration seems to be superior in this regard, especially in terms of satisfying the public that offenders are getting their just deserts. There are, nonetheless, two qualifications to be made:

1. As discussed in chapters 2 and 3, it is the contention of the researcher that the unintended consequences of incarceration, in particular, can lead to situations where the real punitiveness of the sanction is totally unrelated to the initial intentions of the sentence. This can lead to gross injustices in terms of a retributive standpoint.
2. Secondly, Petersilia (1990) has shown that ISP programs can be made so severe that some offenders (about a third in a study in Marion County, Oregon) chose to go to prison instead of participating in ISP. In her article, "When probation becomes more dreaded than prison", she also argues that imprisonment does not seem to hold the same stigmatising effects as in the past, especially for some segments in the population (*Ibid.*).

It is evident from these facts that public opinions (which include those of the judiciary) seems to play an important role here, and, where the negative effects of imprisonment - which are fairly well-known - are taken into account, the punishment sought for with imprisonment can perhaps be more aptly described as a type of public revenge than as just deserts in a penological sense.

Ability to curb recidivism (points 3 and 6): Concerning recidivism, some of the most recent findings on the relationship between intensive supervision and treatment (especially drug

treatment) (see point 4.3.3.3) have shown positive results. These results may not sound like much, but the fact that it has been replicated in a number of places, together with the stature of some of the research bodies that have investigated them (the RAND Corporation, for instance) makes for interesting reading from a correctional viewpoint. Where the history of the prison has shown a nearly constant failure to reduce recidivism (incarceration often leads to an increase in recidivism - see point 3.3.1.2), these results of probation are very promising for the future, especially since most community programs (except for some isolated examples) are also unable to prevent people from re-offending.

The humaneness of sanctions (points 4 and 7): The humaneness of probation is by far the strongest point in its favour. As a community-based measure, it provides an opportunity to the offender to get her life in order, in contrast to imprisonment, where the offender is usually worse off than before.

Cost-effectiveness (points 5 and 8): Concerning the argument that probation is less expensive than imprisonment, it seems as if though cost-effectiveness depends to a large extent on the form that a specific probation program takes, as well as on aspects such as the real time people spend on probation versus imprisonment.

For the researcher, the biggest advantage of probation lies in its potential to bring about positive change in peoples' lives. Where imprisonment seems to have some inherent features that resist offender rehabilitation, probation is much more adaptable and therefore also much more likely to influence the offender in a positive way. What the advantages of probation basically boil down to is the way in which it is applied. The form that it takes is consequently often not as important as how it is applied.

7.4 THE LIMITATIONS OF PROBATION

There are, however, certain limitations of probation that should be realistically foreseen.

7.4.1 The kind of offender who can be placed under probation

According to Clear (1996:3) one of the most established findings in criminological literature is that a small percentage of offenders commit the largest percentage of crime. Various studies propose a “7/70” theory of crime committal, meaning that seven per cent of offenders commit 70 per cent of the crimes (Farrington 1986, Greenwood 1982, Wolfgang, Figlio & Sellin 1972). Incapacitating offenders that fall in the seven per cent range would obviously have a substantial influence on preventing crime.

If this supposition is true, it would also mean that a large proportion of offenders who are currently sent to prison can, strictly speaking, be handled in the community with a moderate amount of safety. This would depend, though, on a reliable risk-prediction instruments to identify these high-risk offenders (see point 7.5.2).

7.4.2 Public opinions

Another limitation on probation has to do with public opinions, and the question whether the current punitive public mood would permit more extensive use of probation. After talks with many people, the researcher should mention his impression that probation already seems to have a bad image under the public and judiciary, mainly as a result of the careless and often illogical way in which some probation offices apply this sanction.

When promoting the use of probation as an alternative to imprisonment, it is important to ask how public opinions should be treated: in other words, to what extent should it be taken into account when considering alternatives? Two aspects may be brought up in this regard:

1. Firstly, the question is sometimes not whether the public agrees with a certain measure or not, but to what extent they will tolerate it. In a study by the author in Mankweng, Northern Province, it was the author's impression from processing responses to open-ended questions, that the public does not see the purpose of punishment as either punishment, or deterrence, or incapacitation, or rehabilitation, as penologists do. Their reasoning can instead be described as that offenders should be punished because they deserve it, that they should be isolated to protect the community, and that the punishment should be made unpleasant so that it would deter them and others from committing crime. It would also help if they could be rehabilitated in the process (Oliver 1999). It is the researcher's opinion that people are not unreasonable and would be prepared to support the notion of probation if it is properly explained to them why probation is necessary and how it could lead to the improvement of the crime situation. Its success, though, would depend to a large degree on how effectively it is handled by the department and to what extent community members are involved in its application.
2. Secondly, any measure will only enjoy long-term support if it is based on a basic code of fairness. It is the author's contention that a basic sense of justice should underlie any correctional measure, which indicates fairness towards all parties concerned, as described by David Fogel (see point 2.1.3.2.1).

7.5 PUTTING WHAT HAS BEEN LEARNT INTO PRACTICE - ELEMENTS OF A MORE JUST PROBATION SYSTEM

The final point in this chapter will attempt to explain in a more practical way what the consequences of some of the conclusions are. The question that can be asked is: How would probation look if it is based on these ideas? It will be done in terms of the following facets:

- A justice stance.
- Community safety.
- Rehabilitation.
- Cost-effectiveness.
- Public opinions.

7.5.1 Probation in terms of a justice stance

It is the researcher's view that probation should be managed with regard to two basic principles:

1. A "minimum intervention strategy," that refers to the minimum amount of intervention necessary to protect the public from crime and to achieve justice, and
2. use of the "least restrictive alternative" principle, where Rubin (1975:333) describes this assumption as that: "...the penalty should be the least restrictive alternative consistent with the goals of punishment."

Adherence to these principles is basically in line with research findings that no intervention (or as little as possible) is sometimes more advantageous for the offender and the community alike. It is also the viewpoint of the writer that the workload of probation officers should be eased in general, so that attention can be focused on those individuals who pose a significant threat to society.

Another assumption of a justice stance is that the punishment should reflect the crime that has been committed, and also, to a lesser extent, the previous convictions of the offender. This proportionality aspect should especially be reflected in the duration of the sentence, which should be equal for offenders who committed the same categories of crimes.

A third key implication of taking a justice stance is proposing the use of presumptive sentencing guidelines - especially with regard to the decisions on what categories of offenders should be placed on probation, as well as decisions pertaining to the lengths of sentences. It is the author's conviction that the consequences of sentencing discretion in terms of aspects such as racial discrimination and the overemphasis on imprisonment as sentence are potentially dangerous for the South African situation and that the normal sentencing system should be replaced by a system that enhances fairness and equality. Although structured sentencing can also be potentially unfair - mainly because factors pertaining to mitigating and aggravating circumstances are often not sufficiently taken into account - it is the researcher's view that, corresponding to the minimum intervention and least restrictive principles, sentences (especially prison sentences) should generally be made much shorter, which would cancel out possible injustices as a result of this problem. This will also make abnormal release strategies unnecessary and promote "truth in sentencing."

7.5.2 Community safety

If the justice stance is drawn a little wider, it is apparent that justice towards society is just as important as justice towards the offender, if not more so. A more viable probation system must consequently be structured so that maximum community safety can be achieved.

There are especially three ways in which a greater degree of community protection can be insured:

1. By the use (and development) of an effective risk-management instrument that can be used to determine the level of intervention in terms of supervision and conditions.
2. By the extensive utilisation of electronic monitoring that is becoming more sophisticated and will be able to monitor offenders on a continuous basis in future.
3. By more community involvement, and by getting family and neighbours, as well as the police, involved in supervising the offender.

Concerning risk prediction (or assessment) instruments, Dowdy, Lacy, & Prabha Unnithan (2002:129) mention that there were eleven risk/classification instruments in the United States in 1995. Examples of such instruments are the RAI (Risk Assessment Instrument) used in Pennsylvania, FORAI (First Offender Risk Assessment Index) of Risler, Sutphen and Shields (2000) used in Georgia, and the LSI (Level of Supervision Inventory) of Dowdy *et al.* (2002), which was tested for use in Colorado. Although it is difficult to typify such instruments (because they make use of different statistical methods and because they are used for different purposes), some of the more reliable tools distinguish between static items (referring to things that are unchangeable, such as age, gravity scores for present and previous crimes, sentence length, parole violations, age at first appearance, number of escapes, work history, etc.) and dynamic items (aspects that are changeable by means of intervention, such as antisocial orientation, emotional and personal attitudes, violent inclinations, etc.). Apart from using these instruments to predict risk, they can also be used to determine the needs of offenders, in particular those criminogenic factors that have been shown to correlate with criminal behaviour and can possibly be modified by means of treatment (the dynamic aspects).

7.5.3 Rehabilitation

It is the author's opinion that rehabilitation as such is not necessarily contrary to the ideas of a justice stance, but that the use of rehabilitation should be limited to an extent that does not exceed the state's right to intervene in the life of an individual and which does not extend the duration of the sentence. If rehabilitation could, in any way, lead to reduced recidivism, it can be seen in the extent that community safety is enhanced.

Strategies such as drug and alcohol treatment, coupled with close supervision as discussed, can thus be seen as an important component of a more effective probation system.

7.5.4 Cost-effectiveness

It is the researcher's contention that probation should be structured in such a way that cost savings are enhanced, except if it defies the principles of community safety. The minimum intervention strategy and least restrictive alternative principle as discussed in point 7.5.1 fit in particularly well with this aim.

7.5.5 In terms of public opinions

It is the viewpoint of the author that a real effort should be made to enhance the image of probation in public. This can firstly be done by an intensive promotion campaign, consisting of elements such as informing the media and politicians about recent developments on the field, by applying community service in public, and by focusing on closer cooperation between probation departments and members of the public, the police, and other community structures.

CHAPTER 8: PROPOSAL: A QUANTITATIVE DECISION-MAKING MODEL FOR PROBATION IN SOUTH AFRICAN

Where chapter 7 attempted to draw together the idea-lines of this study, chapter 8 will advance some proposals for probation in a South African setting.

Following from the previous discussion, this study wants to propose a quantitative decision-making probation system for South Africa, in other words, the use of a structured model to guide the main probation decisions instead of the subjective decision-making processes that are currently taking place. The proposals made in this study will only be touched on in broad terms as the purpose of the study is only to introduce the concept of a quantified model. Quantification in this regard does not mean that the proposals here are in a numerical form, since the scales needed could only be developed once variables such as risk, seriousness, and the severity of sanctions can be analysed within a specific context.

This quantification of decision-making is meant to counteract, in particular, the abuse of sentencing discretion that leads to the overemphasis on imprisonment in South Africa; and to guide the uniform implementation of probation by probation offices. The use of risk/need prediction instruments also holds the advantage that scarce resources, in terms of manpower and financial resources, can be concentrated on those offenders who constitute a high risk to society.

There are indications of a more structured approach towards noncustodial penalties (and in particular probation) taking place all over the world. According to Beto (1994:81) the following conclusions can be drawn from a comparison of noncustodial penalties from countries all over the world:

- That, despite a reluctance to move away from imprisonment, there is an interest all over the world to increase the use of noncustodial sanctions.
- In some countries the use of a continuum of sanctions has been adopted.
- That the use of noncustodial sanctions has been promoted by using sentencing guidelines (mandatory and advisory).
- That there is an increased interest in establishing national and international standards, with an emphasis on legal safeguards.

On a more philosophical level, Braithwaite (2000) ascribes the current emphasis on control to a shift from a welfare state governance which was characterised by demand management and an emphasis on street crimes, to a style of authority that recognizes new social forces and mentalities, particularly of the globalising logic of risk management.

8.1 BASIC PRINCIPLES

As described in point 7.5.1, this system should be based on the ideals of a minimum intervention strategy and least restrictive alternative principles. It is also the contention of the writer that such a system should have as point of departure the intention of keeping the process as simple as possible, in order to promote its applicability and efficiency.

A root principle of a quantified probation model is the so-called “7/70” principle (see point 7.4.1), according to which, in terms of empirical indications, an effective system should aim to identify those offenders who pose a significant risk to society and who should be incarcerated, in contrast to those who can be managed in the community. In practical terms, this means that a quantified probation system should be geared towards identifying those offenders who post a risk to society and either monitor and rehabilitate them intensively, or see to it that their sentences are revoked as soon as they display hazardous behaviour.

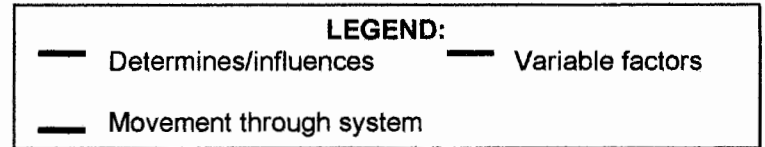
8.2 DESCRIPTION OF STRUCTURE

This study wants to propose quantified decision-making procedures during three major stages of the probation process:

1. Structured sentencing, where both the decision to imprison or not and the duration of sentences are contained in sentencing guidelines. In this instance, two scales are involved: A scale determining crime seriousness and one deciding on the severity of punishment.
2. A risk/needs assessment instrument determining the supervision and conditions of probationers. The scales that should be drawn up here are: A risk prediction scale and a structured response in terms of intensity of surveillance and/or treatment.
3. A structured revocation strategy. In this case the scales that must be drawn up include one determining violation severity and another establishing the punitive response thereto (either in the form of an adjustment in supervision or a revocation of the sentence of probation).

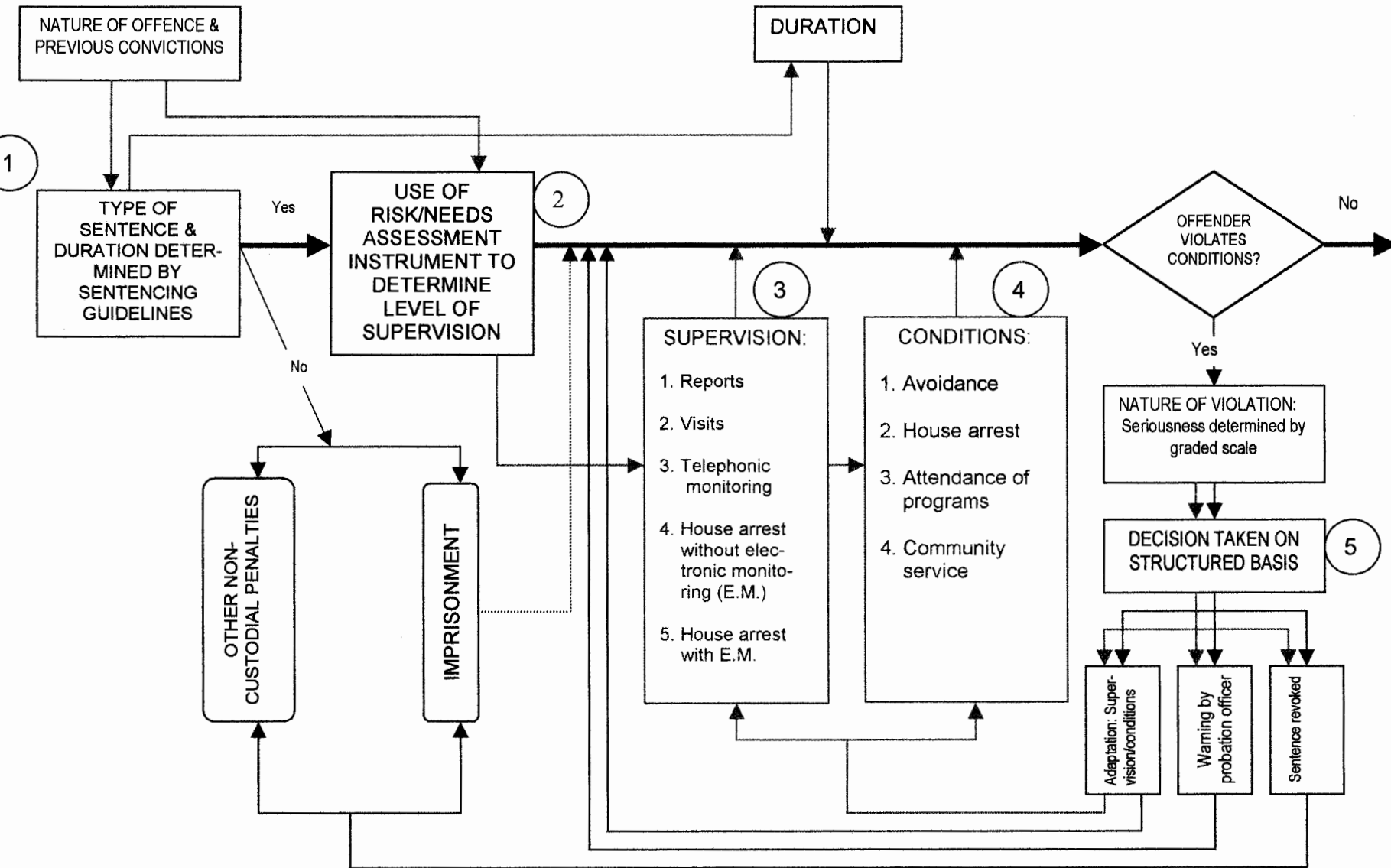
The proposed probation model for South African can be structured as follows:

DIAGRAM 8-1: PROPOSED PROBATION MODEL FOR S.A.



CORRECTIONS

EXITING SYSTEM



Its suggested characteristics can be explained as follows:

Point 1: It is firstly proposed that sentencing guidelines should be used that determine both the **type** and **duration** of sentences. An example of a system of this type is in Oklahoma where the legislature has enacted the Community Sentencing Act that mandate community sanctions for less violent offenders (Cowley 1998:38). By removing or largely reducing the sentencing discretion of judicial officers, prison populations can be managed on a more systematic basis, assigning offenders to either prison or probation (or to other available dispositions) according to the availability of resources.

Another advantage of quantifying crimes according to their seriousness-levels, is that community values can also be used in drawing up the scale, by means of studies on perceptions of the relative severity of crimes (see Wolfgang *et al.* 1985). This can make the sentencing system that is used more reflective of the norms and values of the community in which it has to function.

Regarding the proposed probation model, the duration of the sentence will be determined by the prescriptions of the guidelines, although some “good time” reductions may possibly be allowed to act as a positive reinforcement measure.

Point 2: The second way of quantifying the probation system is by the use of a risk/needs prediction instrument to single out those offenders who pose a real threat to society and/or who need special attention with regard to treatment (see point 7.5.2). One of the main reasons for using correctional prediction instruments is to expand resources , both in terms of supervision capacity and treatment resources (Dowdy *et al.* 2002:29, Parent *et al.* 1997:5). With regard to the “7/70” principle, as mentioned by Clear (1996) and referred to in point 7.4.1, the ultimate goal of such an instrument is actually to determine which offenders form part of the small number of offenders who are responsible for the large majority of crimes (the “serious” criminals), as these offenders need either to be incarcerated or - in a probation

setting - to be monitored and to receive intensive treatment for those aspects that match the offender's criminogenic needs (such as violence, drug abuse, etc.).

The researcher wants to suggest in this regard that, although the duration of sentences for specific crime categories should be equal (as determined by the sentencing guidelines), that the degree of supervision and compulsory treatment strategies should be dependent on the results of these risk-prediction tools. This would mean, in other words, that two offenders who committed crimes of equal seriousness, with a similar number of previous convictions, would receive sentences of equal length, but that their probation sentences may differ in terms of the intensity of supervision as well as the treatment programs that they have to undergo. In practice, this should not lead to widely divergent treatment, as current crimes and previous convictions usually figure prominently as indicators of risk in risk/need assessment instruments. Although this may deviate somewhat from a pure justice approach, it is the researcher's opinion that justice - in this case towards the community - weighs up more heavily than justice towards the offender.

Point 3: To simplify such a system as far as possible, supervision could be reduced to four categories, namely:

1. No supervision (where it is just required of the probationer to report to the office periodically (once a month, for instance)).
2. Minimum supervision (which will also include unannounced visits to the offender's home once or twice per month).
3. Medium supervision (where house arrest can possibly be introduced, as well as weekly visits to the offender's home).
4. Maximum supervision, where two to three unannounced visits to the offender's home or workplace would be supplemented by house arrest, electronic monitoring, and even

enforced searches of an offender's home for stolen goods or illegal substances (in collaboration with members of the police).

The basic rule would be to reserve close and high-intensity surveillance for high-risk probationers, whilst placing very little restrictions on those who are not likely to commit further crimes.

Point 4: It is the author's conviction that a basic sentence of probation should consist of nothing more than the basic avoidance conditions, such as that the offender refrain from committing crime, associating with criminal elements, using alcohol or drugs, or leaving the magisterial district without permission. Community service should only be used as part of a continuum of disciplinary sanctions against offenders who violate their conditions and not as a basic condition for probationers. In a system where sentencing officials do not have to be convinced of the punitiveness of probation, organising community service and responding to violations often only takes up valuable time from probation officers, whilst it is doubtful that it has any rehabilitative effect. House arrest (with or without electronic monitoring) and compulsory treatment or training, on the other hand, will only apply to those offenders who have been identified as high-risk cases.

What could have more value, is for probationers to undergo a few days of orientation at the onset of their sentences. In addition to ensuring that offenders fully understand their conditions and the consequences of violations (a guidebook could be issued to each probationer), community service could also be used for a limited period (four Saturdays, for instance), to convince probationers of the serious intentions of the probation office. To simplify procedures, and also to act as advertisement for probation, all new probationers as well as those who violated conditions could be included in a team that perform public projects, such as cleaning up streets, tending municipal gardens, etc.

Point 5: The third decision-making process that can be structured has to do with the structuring of probation violation decisions. The importance of this issue lies in the fact that the safety of the community as well as the credibility of probation is at stake when probationers violate their conditions. Some believe that, philosophically speaking, the best way of protecting the public would be to revoke community supervision for as many offenders as possible and to return technical violators to the prison on the least provocation. (Buddress 1997:6). The reality, however, is that it is impractical to remove probationers from the community at the first sign of a problem (Burke 2001:5), as technical violations are not necessarily a sign of risk in terms of recidivism (Petersilia 1997:5). The problem is consequently to be able to distinguish between offenders who need to be removed quickly from the community and those violators who are low-risk, and whose offences can be handled in some other way. In this respect, appropriate responses towards violators of conditions would again depend on the development of an accurate risk prediction instrument that is applicable to South African conditions.

The State of Georgia uses a scheme of escalating sanctions for probation violators. In this program, every technical violation, such as drinking or missing an appointment, causes stricter supervision. Instead of direct revocation, a range of intermediate sanctions, such as house arrest, detention in a probation detention centre, and boot camps are used to try and keep offenders out of prison (Economist 1995).

For South Africa, a range of intermediate penalties on a continuum scale can possibly take the following form:

TABLE 8-1: A POSSIBLE VIOLATION SEVERITY SCALE

VIOLATION SEVERITY	RESPONSE
Low severity and risk	<ul style="list-style-type: none">• Reprimand• House arrest (up to seven days)• Community service (up to eight hours)• Loss of travel privileges• Increased reporting to probation office• Start with drug or alcohol testing (in the case of a drug or alcohol related violation)
Moderate severity and risk	<ul style="list-style-type: none">• Community service (4 to 16 hours)• House arrest for up to 30 days• Increased supervision level• Increased drug or alcohol testing• Compulsory drug treatment
High severity and risk	<ul style="list-style-type: none">• House arrest and electronic monitoring• Residential treatment• 72 hours in prison• Periodical imprisonment with probation• Imprisonment

These is only a proposal, however, and its actual form would depend on a planned structure that takes into account the wished-for severity of response and the available resources.

In contrast to negative responses to probation violations, it also makes sense to include some incentive measures to motivate good behaviour. These may include:

1. Certificates of completion and reference letters to confirm good behaviour.
2. Reduction of supervision levels, and travel privileges (a weekend or a week off, for instance).
3. Relaxation of house arrest conditions for high-risk offenders.
4. Reduction of sentence duration.

8.3 SOME IMPLICATIONS OF THIS MODEL

This point will finally look at three vital implications of a quantified model:

8.3.1 The application of probation

Because higher-risk offenders are released into the community, the effective application of probation becomes more critical. In this regard, a quantified model is meant to assist probation officers by structuring decisions and channelling activities to focus on high-risk probationers. The higher risk involved necessitates, however, that probation officers must apply measures with celerity:

1. For low-risk offenders, to identify risk-related behaviour before it can develop into more serious conduct, and
2. for high risk offenders to prevent conduct that may be harmful to community safety.

The researcher wants to suggest that **community cooperation** is vital with regard to the success of such a system. Because higher-risk offenders are accommodated in the community, a number of strategies may be employed to advance cooperation with the public:

1. The idea inherent to community policing, namely that police officers are assigned to specific neighbourhood and get to know the people well, can also be replicated in the probation setting. Probation officers who are well-known by the public will have a better chance of maintaining control over probationers. In this regard, it may also be a good idea to inform neighbours about the probationer's status and to involve them in the supervision process.

2. Probation/Police Cooperative Action – where probation officers work closely with local law enforcement, sharing information about offenders under supervision. Police are also advised of the probation conditions imposed on all probationers on their beat.
3. Citizen Advisory Committees: Creating advisory groups to probation of high-profile citizen activists, attorneys, law enforcement officials, academics, business leaders and others can foster support for probation programs, and can assist to integrate probation properly into community structures.

8.3.2 The development of an effective risk/needs prediction instrument

Because it has been shown that risk/needs prediction instruments are not always transferable from one setting to another¹, a unique instrument will have to be developed for use in South Africa. It is important to notice is that the development of such an instrument is not a once-off process, but that it should be refined on a continuous basis as crime trends, value systems, and demographic variables change.

8.3.3 Treatment strategy

Rehabilitation efforts should be concentrated on those types of offenders that have been shown in research to be influenceable, such as drug and violent offenders (see point 8.2). The reason why drug offenders should be singled out for attention lies in the close relationship between the use of substance abuse and crime (Bartollas & Conrad 1992:207). According to

¹ Dowdy *et al.* (2002) refers to the "Level of Supervision Inventory" (LSI) that was imported from Canada, and which was widely adopted in the USA. They found it invalid for Colorado, though.

Petersilia (2001:109) research suggests that there are drug treatment program models that are effective at reducing recidivism rates, and that the cost benefit tradeoffs between prison and community corrections are among the highest for that subpopulation. Concerning violent offenders, Yazar (2001:102) remarks that Canadian research shows that a history of violent offending is a strong predictor of future violence, indicating the importance of effective treatment strategies for this group.

8.4 END NOTE

To conclude, the researcher just wants to submit a warning with regard to the use of a structured system. Although a system such as this attempts to build in certain characteristics that safeguard fair treatment, it can easily be misused by authorities - especially by the indiscriminate increase of sentencing tariffs and also by the indiscrete use of mandatory minimum sentences for certain offences. The same elements that protects offenders against discretion can then become instruments in the hand of the government to exert absolute control over offenders, without the possibility of mitigating practices such as parole or sentencing reprieve.

BIBLIOGRAPHY

Adams, W.P., Roth, J.A. & Scalia, J. 1998. *Federal Offenders under Community Supervision, 1987-96*. Washington, DC: Department of Justice. (NCJ 168636).

Albrecht, H.J. 1998. *Modern trends in Criminal Corrections and prison systems in Europe*. Paper delivered at the Second International Conference on Modern Trends in Corrections, Midrand: Technikon SA, Programme Group: Correctional Services Management:53-84.

Alpert, A.D. 2001. Probation officers and correctional treatment specialists. *Occupational Outlook Quarterly*, Fall 2001:28-31.

American Correctional Association. 1975. *Manual of Correctional Standards*. College Park, Md.

Austin, J. & Krisberg, B. 1982. The Unmet Promise of Alternatives to Incarceration. *Crime & Delinquency*, July 1982:374-409.

Barnes, H.E. & Teeters, N.K. 1959. *New Horizons in Criminology, 3rd Edition*. Englewood Cliffs, NJ: Prentice-Hall.

Baron, S.W. & Hartnagel, T.F. 1996. "Lock 'em up": Attitudes toward punishing juvenile offenders. *Canadian Journal of Criminology*, April 1996:191-212.

Barry, J.V. 1956. Alexander Maconochie. *Journal of Criminal Law*, 47(2):145-161.

Bartollas, C. & Conrad, J.P. 1992. *Introduction to Corrections, 2nd edition*. Ohio: HarperCollins.

Bartollas, C. 1985. *Correctional Treatment: Theory and Practice*. Englewood Cliffs, NJ: Prentice-Hall.

Baumer, T.L. & Mendelsohn, R.I. 1992. Electronically Monitored Home Confinement: Does it Work?, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:54-67.

Beccaria, C. 1986. *On Crimes and Punishments (translated form the original published in 1764 by David Young)*. Indianapolis: Hackett.

Beck, A. & Shipley, B.E. 1989. *Recidivism of prisoners released in 1983*. Washington, DC: US Department of Justice.

Bedau, H.A. 1977. Concessions to retribution in punishment, in *Justice and Punishment*, editors J.B. Cederblom, W.L. Blizek. Cambridge, Mass.: Ballinger:51-73.

Benekos, P.J. 1990. Beyond reintegration: Community Corrections in a retributive era. *Federal Probation*, 54(1):52-57.

Bergalli, R. 1995. The Spanish Attempt to Build a Democratic Criminal Justice System, in *Western European Penal Systems*, editors V. Ruggiero, M. Ryan & J. Sim. London: Sage:149-168.

Bessette, J.M. 1997. In pursuit of criminal justice. *Public Interest*, 129:61-73.

Beto, D.R. 1994. Review of Alternatives to Imprisonment in Comparative Perspective, edited by. U. Zvekic. *Federal Probation*, 58(4):79-81.

Bilchik, S., Seymour, C. & Kreischer, K. 2001. Parents in Prison. *Corrections Today*, 63(7):108-111.

Blanshard, B. 1968. Retribution revisited, in *Philosophical Perspectives on Punishment*, editors E.H. Madden, R. Handy, and M. Farber. Springfield: Charles C. Thomas.

Blumstein, A. & Beck, A.J. 1999. Population Growth in US Prisons, 1980-1996, in *Prisons, Crime and Justice: A Review of Research*, vol. 26, editors M. Tonry, J. Petersilia. Chicago, IL: University of Chicago Press.

Boe, R., Motiuk, L. & Muirhead, M. 1998. *Recent Trends and Patterns Shaping the Corrections Population in Canada: 1983/84 to 1996/97*. Correctional Service of Canada, May 1998. URL: <http://www.csc-scc.gc.ca/text/rsrch/briefs/b20/b20e.shtml>. Accessed May 2002.

Bonczar, T.P. 1997. *Characteristics of Adults on Probation, 1995*. Bureau of Justice Statistics, U.S. Department of Justice: Washington, DC. (Special Report).

Bonn, R.L. 1984. *Criminology*. New York: McGraw-Hill.

Bonta, J., Wallace-Capretta, S. & Rooney, J. 2000. Can Electronic Monitoring Make a Difference? An Evaluation of Three Canadian Programs. *Crime & Delinquency*, 46(1):61-75.

Boone, H.N. & Fulton, B.A. 1996. *Implementing Performance-Based Measures in Community Corrections*. US Government Printer: US Department of Justice. National Institute of Justice.

Braithwaite, J. 2000. The New Regulatory State and the Transformation of Criminology. *British Journal of Criminology*, 40:222-238.

Bralley, J. & Prevost, J. 2001. Reinventing Supervision: Georgia Parole's Results-Drive Supervision. *Corrections Today*, 63(2):120-125.

Brillon, Y. 1988. Punitiveness, status and ideology in three Canadian provinces, in *Public Attitudes to Sentencing*, editors N. Walker, M. Hough. Aldershot: Gower:84-110.

- Brown, M.P. & Elrod, P. 1995. Electronic House Arrest: An Examination of Citizen Attitudes. *Crime & Delinquency*, 41(3):332-347.
- Buddress, L.A.N. 1997. Federal probation and pretrial services – a cost-effective and successful *community corrections* system. *Federal Probation*, 61(1):5-13.
- Burke, P. 2001. Probation and Parole Violations: An Overview of Critical Issues, in *Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development*, editor M.M. Carter. National Institute of Corrections, U.S. Department of Justice:5-12. URL: <http://www.nicic.org>. Accessed May 2002.
- Byrne, J.M. 1986. The Control Controversy: A Preliminary Examination of Intensive Probation Supervision Programs in the United States. *Federal Probation*, 50:4-16.
- Byrne, J.M., Lurigio, A.J. & Baird, C. 1989. The Effectiveness of the New Intensive Supervision Programs. *Research in Corrections*, 2(2):1-78.
- Byrne, J.M., Lurigio, A.J. & Petersilia, J. (eds.) 1992. *Smart Sentencing: The Emergence of Intermediate Sanctions*. Newbury Park: Sage.
- Cadigan, T.P. 1991. Electronic monitoring in Federal pretrial release. *Federal Probation*, 55(1):26-30.
- Caldwell, R.G. 1956. *Criminology*. New York: Ronald.
- Carcach, C. & Grant, A. 2000. *Australian Corrections: Main Demographic Characteristics of Prison Populations*. Canberra: Australian Institute of Criminology.
- Carney, L.P. 1980. *Corrections: Treatment and Philosophy*. Englewood Cliffs, NJ: Prentice-Hall.

Carter, M.M. (ed.). 2001. Responding to Parole & Probation Violations: A Handbook to Guide Local Policy Development. National Institute of Corrections, U.S. Department of Justice. URL: <http://www.nicic.org>. Accessed April 2002. (C97CO4GIE2).

Cavadino, M. & Dignan, J. 1997. *The Penal System: An Introduction*, 2nd Ed. London: Sage.

Cederblom, J.B. & Blizek, W.L. (eds.). 1977. *Justice and Punishment*. Cambridge, Mass.: Ballinger.

Chambliss, W.J. 1969. *Crime and the legal process*. New York: McGraw-Hill.

Cilliers, C.H. & Van Zyl Smit, D. 1995. The prevention of crime and treatment of offenders in the Republic of South Africa: A report on the occasion of the Ninth United Nations Congress on the prevention of crime and the treatment of offenders. Cairo, April – May 1995. Pretoria, South African Police Service.

Cilliers, C.H. Professor in Criminology, Unisa. 2002. Telephonic conversation. 22 May 2002, Polokwane - Pretoria.

Clear, T. & Cole, G. 2000. *American corrections*. 5th ed. Belmont, Calif.: Wadsworth.

Clear, T.R. & Byrne, J.M. 1992. The Future of Intermediate Sanctions: Questions to Consider, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:319-331.

Clear, T.R. 1996. *Backfire: When Incarceration Increases Crime*. URL: <http://www.doc.state.ok.us/docs/ocjrc.ocjrc96/ocjrc7.htm>. Accessed March 2002.

Cochran, D., Corbett, R.P., Nidorf, B., Buck, G.S. & Stiles, D.R. 1992. *Managing Probation with Scarce Resources: Obstacles and Opportunities*. U.S. Department of Justice. National Institute of Corrections.

Cohen, S. 1985. *Visions of Social Control*. Cambridge: Polity.

Cole, G.F. 1992. Monetary Sanctions: The Problem of Compliance, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:142-151.

Conklin, J. E. 1992. *Criminology*. 4th ed. New York: MacMillan.

Conrad, J. 1984. The redefinition of Probation: Drastic proposals to solve an urgent problem. in *Probation and Justice: Reconsideration of Mission*, editors P. McAnany, D. Thomson, D. Fogel. M.A., Oelgeschlager, Gunn & Hain.

Conrad, J.P. 1985. The Penal Dilemma and Its Emerging Solution. *Crime & Delinquency*, 31(3):411-422.

Corbett, M. 1981. Public support for "Law and Order." *Criminology*, 19(3):328-343.

Corbett, R.P. 1996. When community corrections means business: Introducing 'reinventing' themes to probation and parole. *Federal Probation*, 60(1):36-43.

Cose, E. 2000. Locked Away and Forgotten. *Newsweek*, 135(9):54.

Cotton, D.J. & Groth, A.N. 1982. Inmate rape: Prevention and Intervention. *Journal of Prison and Jail Health*, 2(1):47-57.

- Courtright, K.E., Berg, B.L. & Mutchnick, R.J. 2000. Rehabilitation in the New Machine? Exploring drug and alcohol use and variables related to success among DUI offenders under electronic monitoring – some preliminary outcome results. *International Journal of Offender Therapy and Comparative Criminology*, 44(3):293-311.
- Cowley, J. 1998. Changing public opinion. *Corrections Today*, 60(1):38-40.
- Crystal, J. 2001. Criminal Justice in the Middle East. *Journal of Criminal Justice*, 29:469-482.
- Cullen, F.T. & Gilbert, K.E. 1982. *Reaffirming Rehabilitation*. Cincinnati: Anderson.
- Cunningham, A. 2001. Forgotten families – the impacts of imprisonment. *Family Matters*, 59:35-39.
- Curtin, J.T. 2001. A Judge's View. *Social Research*, 68(3):869-875.
- Deng, X., Zhang, L. & Cordilia, A. 1998. Social Control and Recidivism in China. *Journal of Contemporary Justice*, 14(3):281-295.
- Dinitz, S. & Conrad, J. 1980. *The Violent Few*. Columbus Ohio: Academy for Contemporary Problems.
- Dowden, C. & Andrews, D.A. 2000. Effective Correctional Treatment and Violent Reoffending: A meta-analysis. *Canadian Journal of Criminology*, October 2000:449-467.
- Dowdes, D. 2001. The macho penal economy: Mass incarceration in the United States – a European perspective. *Punishment & Society*, 3(1):61-80.
- Dowdy, E.R., Lacy, M.G. & Prabha Unnithan, N. 2002. Correctional Prediction and the Level of Supervision Inventory. *Journal of Criminal Justice*, 30:29-39.

- Dumond, R.W. 2000. Inmate Sexual Assault: The Plague that Persists. *The Prison Journal*, 80(4):407-414.
- Durham, A.M. 1993. Public opinion regarding sentences for crime: does it exist? *Journal of Criminal Justice*, 21:1-11.
- Duster, T. 1995. The New Crisis of Legitimacy in Controls, Prisons, and Legal Structures. *The American Sociologist*, Spring 1995:20-30.
- Economist.. 1995. If Not Jail, What? Section: American Survey 12/9/95, 337(7944):26-28.
- Erickson, M.L. & Gibbs, J.P. 1979. On the perceived severity of legal penalties. *Journal of Criminal Law and Criminology*, 70:102-116.
- Erwin, B. 1990. Old and New Tools for the Modern Probation Officer. *Crime & Delinquency*, 36(1):61-75.
- Etter, G.W. & Hammond, J. 2001. Community Service work as part of offender rehabilitation. *Corrections Today*, 63(7):114-117.
- Evans, D.G. 2001b. Partnership in Supervision. *Corrections Today*, 63(2):110-111.
- Farrington, D. 1986. *The Cambridge study on delinquency: Long term follow-up*. Cambridge, MA: Cambridge University Press.
- Ferri, E. 1910. *The positive school of criminology*. Chicago Ill.: Charles H. Kerr.
- FIGGIE. 1980. *The Figgie Report on Fear of Crime: America Afraid, Part I*, New York: Research and Forecasts Inc.

Florida Corrections Commission. [2000]. URL:

<http://www.dos.state.fl.us/fgils/agencies/free/reports/>. Accessed June 2000.

Fogel, D. 1975. "...*We are the living proof...*" *The Justice Model for Corrections*. Cincinnati: W.H. Anderson.

Forst, M.L. (ed.). 1982. *Sentencing Reform: Experiments in Reducing Disparity*. Beverly Hills, Calif.: Sage.

Forst, M.L. 1982. Sentencing disparity: an overview of research and issues, in *Sentencing reform: experiments in reducing disparity*, editor M.L. Forst.. Beverly Hills, Calif.: Sage: 9-34.

Fox, V. 1972. *Introduction to Corrections, 3rd Ed.* Englewood Cliffs: Prentice-Hall.

Frankel, M. 1972a. *Criminal Sentences: Law without order*. New York: Hill & Wang.

Frankel, M. 1972b. Lawlessness in Sentencing. *University of Cincinnati Law Review*, 41:901.

Freeman, R.B. 1992. Crime and unemployment of disadvantaged youth. (in Harrell, A. & Peterson, G. (eds.), *Drugs, crime and social isolation: Barriers to urban opportunity*. Washington, DC: Urban Institute.

Funk and Wagnalls Standard Dictionary of the English Language. 1970. International Edition. New York: Funk & Wagnalls.

Futurist. 1994. Alternatives to Prison. January-February:53.

Gabel, K. & Johnston, D. (eds.) 1995. *Children of incarcerated parents*. New York: Lexington Books.

Gabel, S. 1992. Children of incarcerated and criminal parents: Adjustment, behavior and prognosis. *Bulletin of American Academic Psychiatry Law*, 20:33-45.

Glaser, D. 1997. *Profitable Penalties: How to Cut Both Crime Rates and Costs*. Thousand Oaks, Calif.: Pine Forge.

Gottfredson, S.D. & Gottfredson, D.M. 1992. *Incapacitation strategies and the criminal career*. LEIG Monograph series, No. 8. Sacramento, CA.

Grasmick, H.G. & McGill, A.L. 1994. Religion, attribution style, and punitiveness toward juvenile offenders. *Criminology*, 32(1):23-45.

Greenfeld, L.A. & Henneberg, M.A. 2001. Victim and Offender Self-Reports of Alcohol Involvement in Crime. *Alcohol Research and Health*, 25(1):20-31.

Greenwood, P. 1982. *Selective incapacitation*. Santa Monica: Rand.

Grimes, P.W. & Rogers, K.E. 1999. Truth-in-sentencing, law enforcement, and inmate population growth. *The Journal of Socio-Economics*, 28:745-757.

Griset, P.L. 2002. New Sentencing Laws follow Old Patterns: A Florida Case Study. *Journal of Criminal Justice*, 30:1-15.

Guinness Book of Records 1996, The. 1996. Enfield, Middlesex: Guinness.

Hagan, J., Hewitt, J. & Alwin, D. 1979. Ceremonial justice: Crime and punishment in a loosely coupled system. *Social Forces*, 58(2):506-527.

Hanson, D. 1999. A Comprehensive Approach to Supervision in the Southern District of West Virginia. *Federal Probation*, 63(1):9-16.

- Hanson, R.K. 2000. Will They Do It Again? Predicting Sex-Offense Recidivism. *Current Directions in Psychological Science*, 9(3):106-109.
- Harker, L. 2002. Prison is no cure. *Community Care*, 1409:20.
- Harlow, R.E., Darley, J.M. & Robinson, P.H. 1995. The severity of intermediate penal sanctions: A psychophysical scaling approach for obtaining community perceptions. *Journal of Quantitative Criminology*, 11(1):71-95.
- Harris, M.K., Corbett, R.P. & Harris, M.K. 1998. Exploring the implications of four sanctioning orientations for community corrections. *Federal Probation*, 62(2):81-95.
- Harris, P.M., Petersen, R.D. & Rapoza, S. 2001. Between Probation and Revocation. A Study of Intermediate Sanctions Decision-Making. *Journal of Criminal Justice*, 29:307-318.
- Hillsman, S.T. & Greene, J.A. 1992. The Use of Fines as an Intermediate Sanction, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:123-141.
- Hlongwane, A.L. (Director Community Corrections). 2002. Statistics of probationers: Department of Correctional Services - Fax received from Department of Correctional Services on 13 June 2002.
- Holsinger, A.M. & Latessa, E.J. 1999. An Empirical Evaluation of a Sanction Continuum: Pathways through the Juvenile Justice System. *Journal of Criminal Justice*, 27(2):155-172.
- Hood, R. 1962. *Sentencing in Magistrates courts*. London: Stevens.
- International Conference on Modern Trends in Corrections (2nd: 1998: Midrand). 1998. Midrand: Technikon SA.

Ives, G. 1970. *A History of Penal Methods: Criminals, Witches, Lunatics*. Montclair, N.J.: Paterson Smith.

Jefferson, J. 1994. Doing Soft Time. *ABA Journal*, April 1994:62-66.

Kent, D.R., Donaldson, S.I., Wyrick, P.A. & Smith, P.J. 2000. Evaluating criminal justice programs designed to reduced crime by targeting repeat gang offenders. *Evaluation and Program Planning*, 23:115-124.

Killinger, G.G. & Cromwell, P.F. 1978. *Corrections in the Community: Alternatives to Imprisonment, Selected Readings (2nd Edition)*. New York: West.

Kolstad, A. 1996. Imprisonment as Rehabilitation: Offender's assessment of why it does not work. *Journal of Criminal Justice*, 24(4):323-335.

Krügel, W.F. & Terblanche, S.S. 1991. *Praktiese vonnisoplegging*. Pretoria: Digma.

Kurki, L. 1999. *Incorporating Restorative and Community Justice into American Sentencing and Corrections*. Washington, DC: US Department of Justice.

Latessa, E.J. & Travis, L.F. 1992. Residential Community Correctional Programs, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:166-181.

Latessa, E.J. 1993. *An Analysis of Pre-Sentencing Recommendations and Judicial Outcomes in Cuyahoga County Adult Probation Department, Cincinnati, OH*. Cincinnati: Department of Criminal Justice, University of Cincinnati.

Lawrence, R. & Johnson, S. 1990. Effects of the Minnesota Sentencing Guidelines on Probation Agents. *Journal of Crime and Justice*, 13:77-104.

- Lawrence, R. 1991. Reexamining Community Corrections Models. *Crime & Delinquency*, 37(4):449-464.
- Lee, J. 1996. Managing Probation Programs with Geographic Information Systems. *Comput., Environ. and Urban Systems*, 19(5/6):409-417.
- Lewis, C.S. 1949. The Humanitarian Theory of Punishment. *20th Century*, 3(3):5-12.
- Lipton, D., Martinson, R. & Wilks, J. 1975. *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies*. New York: Praeger.
- Loven, J. 2001. Correctional Population at Record. Associated Press Online, 08/26/2001.
URL: <http://www.ojp.usdoj.gov/bjs>. Accessed May 2002.
- Lowstein, A. 1986. Temporary single parenthood – The case of prisoner's families. *Family Relations*, 35:79-85.
- Lurigio, A.J. & Petersilia, J. 1992. The Emergence of Intensive Probation Supervision Programs in the United States, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:3-17.
- MacDonald, S.S. & Baroody-Hart, C. 1999. Communication between Probation Officers and Judges: An Innovative Model. *Federal Probation*, 63(1):42-51, June 1999.
- MacKenzie, D.L. & Parent, D.G. 1992. Boot Camp Prisons for Young Offenders, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:103-122.
- MacKenzie, D.L. 1997. Criminal Justice and Crime Prevention, in *Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress*, editors

L.W. Sherman, D. Gottfredson, D. MacKenzie, J. Eck, P. Reuter, S. Bushway. College Park, MD: University of Maryland:390-462.

MacKenzie, D.L. 2000. Evidence-Based Corrections: Identifying What Works. *Crime & Delinquency*, 46(4):457-471.

Madden, E.H., Handy, R. & Farber, M. (eds.). 1968. Philosophical Perspectives on Punishment. Springfield: Charles C. Thomas.

Marciniak, L.M. 2000. The Addition of Day Reporting to Intensive Supervision Probation: A Comparison of Recidivism Rates. *Federal Probation*, 64(1):34-40.

Martinson, R. 1976. What works: Questions and answers about prison reform, in *Rehabilitation, recidivism and research*, editors R. Martinson, T. Palmer & S. Adams. Hackensack, NJ: National Council on Crime and Delinquency.

Martinson, R., Palmer, T. & Adams, S. (eds.). 1976. *Rehabilitation, recidivism and research*. Hackensack, NJ: National Council on Crime and Delinquency.

Matthews, R. & Francis, P. 1996. Towards 2000: An Introduction, in *Prisons 2000: An International Perspective on the Current State and Future of Imprisonment*, editors R. Matthews & P. Francis. New York: St. Martin's: 1-10.

Mauer, M. 2001. The causes and consequences of prison growth in the United States. *Punishment & Society*, 3(1):9-20.

McAnany, P. Thomson, D. & Fogel, D. (eds.) 1984. *Probation and Justice: Reconsideration of Mission*. M.A., Oelgeschlager, Gunn & Hain.

McCarthy, B.R. & McCarthy, B.J. 1991. *Community-Based Corrections*, 2nd Ed. Belmont, Calif.: Wadsworth.

McDevitt, J. & Miliano, R. 1992. Day Reporting Centers: An Innovative Concept in Intermediate Sanctions, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:152-165.

McDonald, D.C. 1989. The cost of corrections: In search of the bottom line. *Research in Corrections*, 2(1):1-25.

McDonald, D.C. 1992. Punishing Labor: Unpaid Community Service, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:182-193.

McGuire, J. 1995. *What Works: Reducing Offending*. Chichester: John Wiley.

McKay, B. & Paris, B. 1998. Forging a police-probation alliance. *FBI Law Enforcement Bulletin*, 67(11):27-33.

Meintjies-Van der Walt, L. 1998. Victory for victims? Recent developments in victim empowerment. *Acta Criminologica*, 11(2):38-47.

Mercer, R., Brooks, M. & Bryant, P.T. 2000. Global Positioning Satellite System: Tracking Offenders in Real Time. *Corrections Today*, 62(4):76-80.

Messner, C. & Ruggiero, V. 1995. Germany: the Penal System between Past and Future, in *Western European Penal Systems*, editors V. Ruggiero, M. Ryan & J. Sim. London: Sage: 128-148.

Oliver, C.E. 1998b. Rehabilitative efforts in Correctional Supervision: Window-dressing or is it actually working? *Acta Criminologica*, 11(1):113-120.

Oliver, C.E. 1999. Public Punitiveness and Opinions on Just Deserts: An Exploratory Study. M.A. dissertation, Pretoria: University of South Africa.

Paparozzi, M.A. 1999. Reinventing Probation from the Top Down: A Look at Leadership. *Corrections Today*, 61(7):118-121.

Parent, D., Dunworth, T., McDonald, D. & Rhodes, W. 1997. *Key Legislative Issues in Criminal Justice: Intermediate Sanctions*. U.S. Department of Justice. National Institute of Justice. Research in Action.

Paterline, B.A. & Petersen, D.M. 1999. Structural and Social Psychological Determinants of Prisonization. *Journal of Criminal Justice*, 27(5):427-441.

Petersilia, J. & Deschenes, E.R. 1994. Perceptions on punishment: Inmates and staff rank the severity of prison versus intermediate punishments. *The Prison Journal*, 74:306-328.

Petersilia, J. & Turner, S. 1991. An evaluation of intensive probation in California. *Journal of Criminal Law & Criminology*, 82:3.

Petersilia, J. & Turner, S. 1993. Intensive Probation and Parole, in *Crime and Justice: A Review of Research*, edited by M. Tonry. Chicago: University of Chicago Press:281-335.

Petersilia, J. 1987. *The Influence of Criminal Justice Research*. Santa Monica, CA: The RAND Corporation.

Petersilia, J. 1988. Probation Reform, in *Controversial Issues in Crime and Justice*, editors J.E. Scott & T. Hirschi. Newburg Park, CA: Sage:166-179.

Petersilia, J. 1990a. When probation becomes more dreaded than prison. *Federal Probation*, 54(1):23-28.

Petersilia, J. 1990b. Conditions that permit Intensive Supervision Programs to Survive. *Crime & Delinquency*, 36:126-145.

Petersilia, J. 1993. Defending the Practical Value of Criminological Research. *Journal of Research in Crime and Delinquency*, 30(4):497-505.

Petersilia, J. 1995. A Crime Control Rationale for Reinvesting in Community Corrections. *Prison Journal*, 75(4):479-497.

Petersilia, J. 1997. *Probation in the United States: Practices and Challenges*. National Institute of Justice, U.S. Department of Justice: Washington, DC.

Petersilia, J. 1998. A Decade of Experimenting with Intermediate Sanctions: What have we learned? *Federal Probation*, 62(2):3-9.

Petersilia, J. 2001. When Prisoners Return to Communities: Political, Economic, and Social Consequences. *Federal Probation*, 65(1):3-8.

Petersilia, J., Lurigio, A.J. & Byrne, J.M. (eds.). 1992. *Smart Sentencing: The Emergence of Intermediate Sanctions*. Newbury Park, Calif.: Sage.

Petersilia, J., Lurigio, A.J. & Byrne, J.M. 1992. Introduction: The Emergence of Intermediate Sanctions, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, J. Petersilia. Newbury Park, Calif.: Sage:ix-xv.

Petersilia, J., Turner, S. & Deschenes, E.P. 1992a. Intensive Supervision Programs for Drug Offenders, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:18-40.

Petersilia, J., Turner, S. & Deschenes, E.P. 1992b. The Costs and Effects of Intensive Supervision for Drug Offenders. *Federal Probation*, 56(4):12-17.

Pfeiffer, C. 1996. Alternative Sanctions in Germany: An Overview of Germany's Sentencing Practices. United States Department of Justice: National Institute of Justice.

Prinsloo, J. 1999. Indigenous law as an alternative to the Criminal Justice System. *Acta Criminologica*, 12(1):63-70.

Quist, R.M. & Matshazi, D.G.M. 2000. The Child and Adolescent Functional Assessment Scale (CAFAS): A Dynamic Predictor of Juvenile Recidivism. *Adolescence*, 35(137):181-192.

Rawls, J. 1972. *A Theory of Justice*. Cambridge: Harvard University Press.

Rector, M.G. 1982. Prisons and Crime. *Crime & Delinquency*, October 1982:505-507.

Reed, D.F. & Reed, E.L. 1997. Children of incarcerated parents. *Social Justice*, 24(3):152-169.

Reid, S.T. 1981. *The correctional system: An introduction*. New York: Holt, Rinehart & Winston.

Renzema, M. 1992. Home Confinement Programs: Development, Implementation, and Impact, in *Smart Sentencing: The Emergence of Intermediate Sanctions*, editors J.M. Byrne, A.J. Lurigio, & J. Petersilia. Newbury Park, Calif.: Sage:41-53.

- Rex, S. Desistance from Offending: Experiences of Probation. *The Howard Journal*, 38(4):366-383.
- Risler, E.A., Sutphen, R. & Shields, J. 2000. Preliminary Validation of the Juvenile First Offender Risk Assessment Index. *Research in Social Work Practice*, 10(1):111-126.
- Robinson, G. 1999. Risk Management and Rehabilitation in the Probation Service: Collision and Collusion. *The Howard Journal*, 38(4):421-433.
- Rose, C. 1997. Electronic monitoring of offenders: A new dimension in community sentencing or a needless diversion? *International Review of Law, Computers & Technology*, 11(1):147-155.
- Rosenfeld, R. & Kempf, K. 1991. The Scope and Purposes of Corrections. Exploring Alternative Responses to Crowding. *Crime & Delinquency*, 37(4):481-505.
- Rubin, S. 1975. Probation or Prison; Applying the Principle of the Least Restrictive Alternative. *Crime & Delinquency*, Oct. 1975:331-336.
- Ruggiero, V. 1995. Flexibility and Intermittent Emergency in the Italian Penal System, in *Western European Penal Systems*, editors V. Ruggiero, M. Ryan, J. Sim. London: Sage:46-70.
- Ruggiero, V., Ryan, M. & Sim, J. (eds.). 1995. *Western European Penal Systems*. London: Sage.
- Rutherford, A. 1991. Introduction: Penal Reform and Prison Realities, in *The State of the Prisons – 200 Years on*, D. Whitfield (editor). London: Routledge:1-12.
- Salla, F. 2001. Brazil's Prison Debacle. *NACLA Report on the Americas*, XXXV(2):8-9.

- Sarnoff, S. 2001. Restoring Justice to the Community: A Realistic Goal? *Federal Probation*, 65(1):33-40.
- Schiraldi, V. 1995. True crime: Crowded, violent prisons extract a cost on society. San Francisco Daily Journal, 10 May 1995:4.
- Schneider, A.L., Ervin, L. & Snyder-Joy, Z. 1996. Further Exploration of the Flight from Discretion: The Role of Risk/Need Instruments in Probation Supervision Decisions. *Journal of Criminal Justice*, 24(2):109-121.
- Schönteich, M. 2000. *Justice versus retribution: Attitudes to punishment in the Eastern Cape*. Pretoria: Institute for Human Rights and Criminal Justice Studies. (ISS Monograph Series No 45).
- Schönteich, M., Mistry, D. & Struwig, J. 2000. *Qualitative research report on sentencing: An empirical qualitative study on the sentencing practices of the South African criminal courts, with particular emphasis on the Criminal Law Amendment Act no. 105 of 1997*. Pretoria: Institute for Human Rights and Criminal Justice Studies, Technikon S.A.
- Scott, J.E. & Hirschi, T. (eds.). 1988. *Controversial Issues in Crime and Justice*. Newburg Park, CA: Sage.
- Sellin, T. & Wolfgang, M.E. 1964. *The measurement of delinquency*. New York, Wiley.
- Shane-Dubow, S. 1998a. Introduction to Models of Sentencing Reform in the United States. *Law & Policy*, 20(3):231-245.
- Shane-Dubow, S. 1998b. Beyond Sentencing Guidelines: Additional Functions for Intermediate Sentencing Entities. *Law & Policy*, 20(4):384-387.

Simons, K.W. 2001. On Equality, Bias Crimes, and Just Deserts. *The Journal of Criminal Law and Criminology*, 91(1):237-267.

Smith, M.E. & Dickey, W.J. 1999. *Reforming Sentencing and Corrections for Just Punishment and Public Safety*. U.S. Department of Justice: National Institute of Justice.

Smith, M.E. 2001. *What Future for "Public Safety" and "Restorative Justice" in Community Corrections?* U.S. Dept. of Justice: National Institute of Justice. Sentencing & Corrections: Issues for the 21st Century.

Snyman, C.R., 1991. *Strafreg-vonnisbundel*. Johannesburg: Juta.

South Africa. 1977. Act no. 51 of 1977. Criminal Procedure Act, 1977. Pretoria: Government Printer.

South Africa. 1983. Act no. 74 of 1983. Child Care Act, 1983. Pretoria: Government Printer.

South Africa. 1986. Act no. 98 of 1986. Probation Act, 1986. Pretoria: Government Printer.

South Africa. 1996. *The Constitution of the Republic of South Africa. Act 108 of 1996*. Pretoria: Government Printer.

South Africa. 1997. Act no. 105 of 1997. Criminal Law Amendment Act, 1997. Pretoria: Government Printer.

South Africa. 1997. Act no. 87 of 1997: Parole and Correctional Supervision Amendment Act, 1997. Pretoria: Government Printer.

South Africa. 1998. Act no. 111 of 1998. Correctional Services Act, 1998. Pretoria: Government Printer.

South Africa. Department of Correctional Services. 1999. *Briefing by Ministry of Correctional Services, 8 February 1999*. URL:

<http://www.polity.org.za/govdocs/speeches/1999/sp0208d.html>. Accessed July 1999).

South Africa. Department of Correctional Services. 2000. *Media conference by Minister of Correctional Services, Mr. Ben Skosana, MP, 14 June 2000*. URL: <http://www-dcs.pwv.gov.za/Speeches/MediaReleases/Minister/14June2000.htm>. Accessed June 2001.

South Africa. Department of Correctional Services. 2001a. *Skosana: Correctional Services Budget Vote 2001/2002, NCOP*. URL: <http://www.dcs.gov.za/Speeches.htm> Accessed April 2002.

South Africa. Department of Correctional Services. 2001b. *Skosana: End of year message*. URL: <http://www.dcs.gov.za> Accessed April 2002.

South Africa. Department of Correctional Services. 2001c. *Address by the Acting Commissioner of Correctional Services on the occasion of the official opening of the community corrections office at Soshanguve on 8 June 2001*. URL: <http://www-dcs.pwv.gov.za/Speeches/Minister/12agun2001.htm>. Accessed March 2002.

South Africa. Department of Correctional Services. National Council on Correctional Services. 2002. *Trends in the prisoner population: January 1995 to January 2002*. Department of Correctional Services: ASD Accommodation.

South Africa. South African Law Commission. 2000. *Sentencing (A new sentencing framework)*. D Van Zyl Smit (project leader), Project 82, December 2000. Pretoria: Government Printer.

Sparks, C. 2001. Prison is a waste. *New Statesman*, 7 May 2001:28.

- Stanz, R. & Tewksbury, R. 2000. Predictors of Success and Recidivism in a Home Incarceration Program. *The Prison Journal*, 80(3):326-344.
- Stern, V. 1999. Alternatives to prison in developing countries. *Punishment & Society*, 1(2):231-241.
- Stinchcombe, A.L., Adams, R., Heimer, C.A., Schepple, K.L., Smith, T.W., & Taylor, D.G. 1980. *Crime and punishment: Changing attitudes in America*. San Francisco: Jossey-Bass.
- Struckman-Johnson, C.J., Struckman-Johnson, D.L., Rucker, L., Bumby, K. & Donaldson, S. 1996. Sexual coercion reported by men and women in prison. *Journal of Sex Research*, 33(1):67-76.
- Sullivan, R.R. 1996. The birth of the prison: discipline or punish? *Journal of Criminal Justice*, 24(5):449-458.
- Swart, D.N. 1998. The Constitutional rights of prisoners with reference to access to courts. *Acta Criminologica* 11(2):48-55.
- Tappan, P.W. 1960. *Crime, Justice and Correction*. New York, McGraw-Hill.
- Thompson, H.S. 1999. Computational Systems, Responsibility, and Moral Sensibility. *Technology in Society*, 21:409-415.
- Toch, H. 1986. *Psychology of Crime and Criminal Justice*. Prospect Heights, Ill.: Waveland Press.
- Tonry, M. & Morris, N. 1990. *Between Prison and Probation*. Oxford: Oxford University Press.

Tonry, M. & Petersilia, J. (eds.). 1999. *Prisons, Crime and Justice: A Review of Research*, vol. 26. Chicago, Ill.: University of Chicago Press.

Tonry, M. & Will, R. 1988. *Intermediate Sanctions*. Preliminary Report to the National Institute of Justice. Washington, DC: National Institute of Justice.

Tonry, M. 1993. *Crime and justice: An annual review of research*. Chicago, Ill: University of Chicago Press.

Tonry, M. 1999a. *Reconsidering Indeterminate and Structured Sentencing*. U.S. Department of Justice: National Institute of Justice. Sentencing and Corrections: Issues for the 21st Century.

Tonry, M. 1999b. *The fragmentation of sentencing and correction in America*. U.S. Department of Justice: National Institute of Justice, Sentencing & Corrections: Issues for the 21st century.

Tonry, M. 1999c. The Failure of the U.S. Sentencing Commission's Guidelines. *Crime & Delinquency*, 39(2):131-149.

Travis, J. 2000. *But They All Come Back: Rethinking Prisoner Reentry*. Sentencing & Corrections: Issues for the 21st Century. U.S. Department of Justice: National Institute of Justice. (No. 7).

Trotter, C. 1993. *The Supervision of Offenders; What Works*. Sydney:Victorian Office of Corrections.

Trotter, C. 1996. The impact of different supervision practices in community corrections; case for optimism. *Australian and New Zealand Journal of Criminology*, 29:29-46.

Tsytsarev, S., Manger, J. & Lodrini, D. 2000. The Use of Reinforcement and Punishment on Incarcerated and Probated Substance-Abusing Juvenile Offenders. *International Journal of Offender Therapy and Comparative Criminology*, 33(1):22-32.

Turner, S., Petersilia, J. & Deschenes, E.P. 2001. Evaluating Intensive Supervision Probation/Parole (ISP) for Drug Offenders. *Crime & Delinquency*, 38(4):539-556.

Turpin, J. 1999. Restorative Justice Challenges Corrections. *Corrections Today*, 61(6):60.

Turpin, J. 2000. Closing Plenary Session: Is the "City of the Future" Reality Today? *Corrections Today*, 62(6):69.

United States of America. United States Department of Justice. 1998. *Critical Elements in the Planning, Development, and Implementation of Successful Correctional Options*. (Monograph. NCJ 168966), Washington, D.C.:Government Printing Office.

United States of America. United States General Accounting Office. 1997. Federal Offenders: Trends in Community Supervision: Report to Congressional Committees. Washington: General Accounting Office. (GAO/GGD-97-110).

United States of America. United States National Advisory Commission on Criminal Justice Standards and Goals. 1973. *Task Force on Corrections*. Washington, D.C., Government Printing Office.

United States of America. US Library of Congress. [2002]. The Library of Congress Country Studies: Area Handbook Series/Federal Research Division. [Online]. URL: <http://lcweb2.loc.gov/frd/cshome.html>. Accessed May 2002.

Von Hirsch, A. 1976. *Doing Justice: The Choice of Punishment*. Report of the Committee for the Study of Incarceration. New York: Hill & Wang.

Von Hirsch, A. 1990. The Ethics of Community-Based Sanctions. *Crime & Delinquency*, 36(1):162-173.

Walker, N. & Hough, M. (eds.) 1988. *Public Attitudes to Sentencing*. Aldershot: Gower.

Walker, N. & Hough, M. 1988. Introduction: developments in methods and perspectives, in *Public Attitudes to Sentencing*, editors N. Walker, M. Hough. Aldershot: Gower:1-15.

Walker, N., Hough, M. & Lewis, H. 1988. Tolerance of leniency and severity in England and Wales. in *Public Attitudes to Sentencing*, editors N. Walker, M. Hough. Aldershot: Gower:178-202.

Ward, D.A. 1973. Evaluative Research for Corrections, in *Prisoners in America*, editor L.E. Ohlin. Englewood Cliffs, NJ: Prentice-Hall:190-191.

Warr, M. 1989. What is the perceived seriousness of crimes? *Criminology*, 27(4):795-821.

Welch, M. 1996. *Corrections: A Critical Approach*. New York: McGraw-Hill.

Whitfield, D. (ed.). 1991. *The State of the Prisons - 200 Years on*. London: Routledge.

Wittenberg, P.M. 1996. Power, influence, and the development of correctional policy. *Federal Probation*, 60(2):43-49.

Wolfgang, M., Figlio, R. & Sellin, T. 1992. *Delinquency in a birth cohort*. Chicago: University of Chicago Press.

Wolfgang, M., Figlio, R., Tracy, P., & Singer, S. 1985. *The National Survey of Crime Severity*. Washington, DC: US Government Printing Office.

Wolfgang, M., Figlio, R., Tracy, P., & Singer, S. 1985. *The National Survey of Crime Severity*. Washington, DC: US Government Printing Office.

World Factbook of Criminal Justice Systems. [2002]. Edited by G. Newman, A.C. Bouloukos & D. Cohen. New York, Albany: State University of New York.

Wright, K. & Wright, D. 1994. *Family life and delinquency and crime: A policymakers guide to the literature*. Washington, DC: National Criminal Justice Reference Service. (OJJDP Publication No. NCJ-140517).

Wright, L.E. & Seymour, B.S. 2000. *Working with children and families separated by incarceration: A handbook for Child Welfare Agencies*. Washington, D.C.: CWLA.

Yazar, R. 2001. The Violence Prevention Program: Intensive Correctional Treatment. *Corrections Today*, April 2001:102-107.

Zimring, F.E. 1976. Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform. *Hastings Center Report*, 6:13-21.